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# REPORTS OF CASES

DECIDED IN THE

## COURT OF COMMON PLEAS,

BY

GEORGE FREDERICK HARMAN,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

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VOL. XXVII.

CONTAINING THE CASES DETERMINED  
FROM TRINITY TERM, 40 VICTORIA, TO HILARY TERM, 40 VICTORIA,  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
A TABLE OF THE NAMES OF CASES CITED,  
AND A DIGEST OF THE PRINCIPAL MATTERS.

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TORONTO :

ROWSSELL & HUTCHISON

1877.

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OF THE

COURT OF COMMON PLEAS

JUDGES

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THE HON. JOHN HARRIS, JUDGE

PRINTED BY ROWSELL AND HUTCHISON, KING STREET EAST, TORONTO.

THOMAS GALT, J.

Minister of Justice

THE HON. EDWARD BLAKE

THE HON. JAMES GILLESPIE, JUDGE  
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1877

J U D G E S  
OF THE  
C O U R T O F C O M M O N P L E A S .

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THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

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*Minister of Justice :*

THE HON. EDWARD BLAKE.

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THE HON. OLIVER MOWAT.



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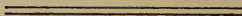
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REPORTS OF CASES  
IN THE  
COURT OF COMMON PLEAS.

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TRINITY TERM, 40 VICTORIA. 1876.

(August 28th to September 9th.)

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*Present :*

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

---

GRAHAM ET AL. V. SMITH.

SPECIAL CASE.

*Stoppage in transitu—Goods bonded in consignee's name—Duties unpaid.*

The plaintiffs at Philadelphia sold to E. B. & Co. at Toronto 92 bags of coffee on credit, and consigned the same to them in bond. On arrival at Toronto they were entered and bonded in the consignees' names and placed in one of the custom's bonded warehouses, subject to the payment of duties. Subsequently E. B. & Co. paid the duties and took out of bond 54 of the bags, but 38 bags still remained in bond, subject to duty, and while they so remained E. B. & Co. became insolvent.

*Held*, that the rights of stoppage in transitu still existed in the plaintiff, though the goods were bonded in the names of the consignees, for until the duties were paid the goods could not be deemed either actually or constructively to have come into the possession of the consignees so as to put an end to the transitus.

THIS was a special case, stated without pleadings.

The action was against the defendant, as assignee of the estate of E. Bendelari & Co., for the recovery of \$996.10.

The plaintiffs, merchants in Philadelphia, sold Messrs. E. Bendelari & Co. 92 bags of coffee on credit, and consigned the same to them.

On the arrival of said coffee in Toronto, a bond was given to the customs authorities, by E. Bendelari & Co. This bond recited: "Whereas the above bounden E. Bendelari & Co., have lately imported into the port of Toronto, in a ship or vessel called," &c., "from Suspension Bridge, the undermentioned goods, namely, 92 bags green coffee, &c., the duties in respect whereof have not been paid, and which goods we are desirous of disposing in warehouse No. 4 at the port of Toronto," &c. Then followed the condition. The warehouse No. 4 was in the warehouse of E. Bendelari & Co., but was a bonded warehouse, and under the exclusive control of the Customs authorities. The 92 bags of coffee were placed in the warehouse, and subsequently the duties were paid on 54 bags, and they were taken out of bond, and sold by the said E. Bendelari & Co., or by the said defendant as such assignee as aforesaid, before the collector of customs was served with the first of the notices hereinafter mentioned, and the remainder thereof, being 38 bags, remained in bond in the said warehouse at the time of the service of the notice on the collector.

The said goods were shipped to Toronto by the said plaintiff, consigned to and at the risk of the said E. Bendelari & Co., who paid the freight thereon.

On the 31st January last, E. Bendelari & Co. held a meeting of their creditors, and the creditors demanded that an assignment in insolvency should be made, but the plaintiffs were not represented at such meeting.

On the 7th February, E. Bendelari & Co. made an assignment under the Insolvent Act of 1875 to the defendant, who accepted the same, and was the duly appointed assignee.

On the 18th February the plaintiffs served on the collector at Toronto a notice and demand, of which the following was a copy:

"We hereby notify you not to deliver to the consignees,

Messrs. E. Bendelari & Co., or their order or assignee, 92 bags of coffee, sold by us to them, and now in one of Her Majesty's bonded warehouses in Toronto, but deliver the same to ourselves or to our order, the purchase money therefor not having been paid, and the said E. Bendelari & Co., having become insolvent before the said coffee has reached their hands.

“(Signed)      GRAHAM & Co.  
“O'DONOHUE & MEEK, Attorneys.”

This notice was dated 18th February, 1876, but, on the 15th February, a warrant had been given for the delivery out of the 54 bags before mentioned.

On the 9th March, the plaintiff served two other notices on the collector, demanding the goods, tendering the amount of the customs duties thereon, but the collector refused to deliver either to the plaintiff or to the defendant.

The question for the opinion of the Court is, whether, under the circumstances and facts herein stated, the plaintiffs were entitled to a delivery to them, as against the defendant, of the said 38 bags of coffee, as having been duly stopped *in transitu*.

If the Court should be of opinion in the affirmative, then judgment shall be entered for the plaintiffs, for \$907.69. and interest thereon and costs of suit.

If the Court should be of opinion in the negative, then judgment shall be entered for the defendant, with costs.

May 30th, 1876. *O'Donohoe* for the plaintiff.

*Foster and J. B. Clarke*, contra.

The argument and cases cited was substantially the same as before the full Court.

June 28th, 1876, GALT, J.—The law on the subject of stoppage in transitu has been fully discussed by Richards, C. J., in the case of *Lewis v. Mason*, 36 U. C. R. 590. That case, however, differed from the present in this important respect, namely, the goods were in the customs warehouse under bond given by the vendor, while here they were bonded in the name of the consignee.

The learned Chief Justice, after referring to all the authorities and particularly to the case of *Strachan v. Trustees of Knox & Co.*, Bell's Commentaries, 5th ed., 176, 19 Faculty Coll. 253, which is very similar to those now under consideration, says at p. 603 : " Here, however, there is an obvious distinction. The goods have never really been bonded in the name of the consignee. It may be doubted if the Crown had any remedy against him for the duties. The original bond taken in Montreal was the one, I apprehend, on which the Crown would be obliged to rely for the payment of the duties ; but under section 60 of the customs Act referred to, sub-sections two and three, if the goods are transferred in the books of the department to a purchaser and stored there in his name, and he has given security for the payment of the duties, then, *perhaps*, the rule referred to in the judgment of Chancellor Walworth and of the Scotch Court might apply. But as at present advised it would not apply to this case, for the goods are not, and were not, bonded in the consignee's name."

I cannot quote the judgment of the learned Chief Justice as a decided authority in favour of the view which I have arrived at, because it is expressed in the form of a doubt ; but it appears to me that the inclination of his opinion was that in a case like the present the transitus is at an end. To hold otherwise would be to lay down a rule that, so long as the duties were unpaid, the transitus continues.

It is not possible that there could be a stronger case than the present. The goods were stored in the name of the purchaser ; he had sold large quantities of them, and had the full and absolute control over them, subject only to the payment of duty, for which he had given his bond.

I have not thought it necessary to cite the authorities, as they are all collected and commented on in the case to which I have referred.

Judgment will be entered for the defendant in both cases.

From this judgment the plaintiff appealed to the full Court.

In this term, September 5th, 1876, the case was argued.

*O'Donohoe* for the appellants. The stoppage in transitu was not at an end, as the goods had not come into the actual or constructive possession of the consignees. The learned Judge endeavoured to distinguish this case from *Lewis v. Mason*, 36 U. C. R. 590, and *Asher v. Grand Trunk R. W. Co.*, 36 U. C. R. 609, on the ground that the goods being bonded in the name of the consignee, they had therefore come into his possession so as to put an end to the transitus. The cases, however, shew that so long as they remain in the possession of the customs authorities, and the duties unpaid, the transitus is not at an end, but that the right to stop still exists: *Howell v. Alport*, 12 C. P. 375; *Burr v. Wilson*, 13 U. C. R. 478; *Northey v. Field*, 2 Esp. 613, and *Lewis v. Mason*, and *Asher v. Grand Trunk R. W. Co.*, above cited, where all the cases are collected. The Scotch case of *Strachan v. Knox*, 1 Bell's Commentaries, 5th ed., 173, 19 F. C. 253, would seem to favour the defendant's contention, but it has not been followed in any of the English cases, and it is in fact decided on the statute of 43 Geo. III. ch. 132, which is in its terms very different from our Act. On the merits the plaintiffs are entitled to succeed, as it is certainly more equitable that the consignors, who have never been paid, should get back their goods than that they should go to the general body of creditors.

*Foster*, and *J. B. Clarke* contra. The ground on which the learned Judge decided this case is correct, namely, that the entry and bonding the goods by the consignee amounted to a transfer of the possession to him so as to put an end to the transitus. The goods though in bond are constructively in the possession of the consignee subject to the payment of the duties. The right to stop in transitu was therefore clearly at an end. This is the doctrine laid down in *Strachan v. Trustees of Knox & Co.*, as cited in Bell's Commentaries, 5th ed. 173, 19 Faculty Coll. 253, and approved of in *Mottram v. Heyer*, 5 Denio 632, and in fact is the result of all the cases: *Lewis v. Mason*, 36 U. C.

R. 590; *Asher v. Grand Trunk R. W. Co.*, 36 U. C. R. 690; *Benjamin* on Sales, 2nd ed., 638-41.

September 18th, 1876. HAGARTY, C. J.—In *Northey v. Field*, 2 Esp. 613, the assignees of a bankrupt consignee sought to recover the value of invoices sent from abroad. By the excise law, twenty days were allowed after arrival of the ship to pay the duty, the goods remaining on board. If not paid within that time, they were removed to the King's cellars, during which time the owners might have them on paying duty, warehouse room, &c. If not then paid within three months, they were sold, and the surplus paid to the owner.

After the ship arrived, the consignees became bankrupt, but before the 20 days expired, and the duties not being paid, the goods were removed to the King's cellars. Nothing is said as to any entry or attempt to enter by the consignee. A day before the three months expired, the agent of the consignor applied for and tried to get the goods, but did not succeed, and they were sold at the King's stores. The contest was for the proceeds of sale.

Lord Kenyon said the Courts had of late years leaned much in favour of the power of the consignor to stop his goods *in transitu*. It was a leaning in furtherance of justice. In the present case the bankrupt had no title to the actual possession till the duties were paid. Until then, they were *quasi in custodia legis*. Before the sale, the agent of the consignor claimed and endeavoured to get possession: that was a sufficient stoppage *in transitu*, &c.

In 1856, *Burr v. Wilson*, 13 U. C. R. 478, was before our Court of Queen's Bench.

Goods purchased in New York by one Fahey, of Kingston, arrived at the latter place and were landed at the custom-house wharf, received by the customs officers, and placed in the custom-house store. No entry in the custom house was made by Fahey in respect of them, nor were any duties paid. Subsequently, Fahey entered, paid duty, and removed from the customs warehouse, two cases

out of the six which were there. After this, Fahey made an assignment, and the consignors claimed to stop in transitu. The case further states, that when the alleged stoppage took place, the goods were in the possession of the wharfinger (who jointly with the custom-house authorities had possession of the warehouse), subject to the permit of the custom house officers, and Fahey's order on production of permit and payment of duties. Freight and charges from New York had been paid by Fahey.

VanKoughnet, for the consignors, argued "that Fahey had obtained no permit to take them out, and had not paid the duties."

The Solicitor-General contra. "The case admits the goods to have been held subject to Fahey's orders; they were therefore in his possession. The statute 10 & 11 Vic. ch. 31, sec. 12, provides for entering goods: the word 'entry,' as used there, means nothing more than bringing the goods and leaving the invoice; he had in fact entered them."

Nothing appears in the case as to any formal warehousing or bonding of the goods by Fahey.

The 10 & 11 Vic. ch. 31, sec. 12, is consolidated in Consol. Stat. C. ch. 17, and contains warehousing provisions, sec. 23, *et seq.*; Consol. Act, sec. 40, *et seq.*; and the importer is allowed to warehouse on giving his own bond for payment of the duties, &c.

Robinson, C. J., said the law was clearly with the plaintiffs, the consignors: that the case of *Northey v. Field*, was expressly in point "to shew that the goods, while in the customs warehouse, subject to payment of duties, are not to be looked upon as in the actual possession of the vendee, so as to put an end to the transitus." And the vendee paying the duty, and taking two of the cases out of the warehouse, did not give him constructive possession of the whole."

Draper, J., now C. J. of Appeal, agreed, and said the case was exactly like *Northey v. Field*: that no entry of the goods had been made, nor duties paid, and therefore they had been put in customs warehouse under sec. 12 of 10 & 11 Vic. ch. 31.

From what is stated it does not appear whether the goods had not been warehoused, and a bond given for the duties as allowed by the Act.

*Howell v. Alport*, 12 C. P. 375, can hardly be distinguished from the (1862) case before us.

The plaintiffs, in New York, sold goods on credit to the defendant Alport. They came to Belleville for the defendant. The collector of customs proved that they came into his possession on the 21st November: that they were "bonded the same day; stored in the bonded warehouse—they were bonded by the defendant." The bonded warehouse was on the defendant's premises, and had two keys, and two locks, one key with the warehouse-man, one with the customs. The goods were carried from the vessel to the warehouse on the defendant's teams, who paid freight and charges. While in the warehouse portions were sold to two different persons by the defendant, and were marked with the purchaser's names in the bonded warehouse by permission of the customs, and still remained there. The consignee stopped payment and the goods were stopped by consignors.

We therefore find that, as we read the case, the consignee had, as here, bonded the goods and sold a part, and paid freight and charges.

Draper, C. J., who had joined in the judgment in *Burr v. Wilson*, says, at p. 378: "I see no substantial distinction between this case and *Burr v. Wilson*, 13 U. C. R. 478 \* \* The goods being subject to duties, were not entered by defendant, and duties paid, but were at once carried by defendant's team to the bonded warehouse and lodged there in the usual manner required by Consol. Stat. C. ch. 17. \* \* When once in the bonded warehouse, they are in possession of the custom house officer, so long as they remain subject to the payment of duties, and *Burr v. Wilson* decides the transitus is not at an end."

As the learned Chief Justice said of the case of *Burr v. Wilson*, we may say that we can see no substantial distinction between this case and that of *Howell v. Alport*.

In *Lewis v. Mason*, 36 U. C. R. 590, the law was elaborately reviewed by Richards, C. J.

There the goods were in the bonded warehouse, sent on by consignors, and the consignee had apparently done nothing in respect of them, although he had notice of their being there.

It was held that the right to stop in transit still remained.

The learned Chief Justice notices the judgment of Chancellor Walworth, in *Mottram v. Heyer*, 5 Denio 629, and a Scotch decision, *Strachan v. Trustees of Knox & Co.*, decided in 1817, referred to in *Bell's Com.*, 5th ed., vol. i., 173, in which it seems decided that after the consignee has made an entry of the goods in the bonded warehouse, and bonded them there for the duties, the transitus is at an end.

The Chief Justice proceeds, at p. 603 : " But under sec. 60 of the Customs' Act referred to, sub-secs. two and three, if the goods are transferred in the books of the department to a purchaser, and stored in his name, and he has given security for the payment of the duties, then perhaps the rule referred to in the judgment of Chancellor Walworth and of the Scotch Court might apply. But as at present advised it would not apply to this case, for the goods are not and were not bonded in the consignee's name."

As far as the decisions of our Courts are concerned, it seems clear to me that we cannot decide against the right to stop in transitu, without overruling *Howell v. Alport*, a decision of this Court, consisting of Draper, C. J., and Richards and Morrison, JJ.

I have not seen any English case in which this Scottish decision has been discussed, although existing nearly sixty years, nor has the precise point apparently arisen.

One of the latest authorities on the general principle, is that of Willes, J., in *Bolton v. Yorkshire and Lancashire R. W. Co.*, L. R. 1 C. P. 431 (1866). After discussing the points, he adds at p. 439: " It must be observed that there is, besides the propositions I have stated, and which are quite familiar, one other propos-

ition which follows, as deducible from these, viz., that the arrival, which is to divest the vendor's right of stoppage in transitu must be such that the buyer has taken actual or constructive possession of the goods."

In 1831, *Haig v. Wallace*, 2 Hud. & Brooke 671, was decided in Ireland.

The vendors had stored some spirits in the customs warehouse. They sold to one Meade, and gave him an order on the defendant, the custom-house storekeeper, to deliver to Meade 20 puncheons of whiskey, he paying duty and storage. Meade presented the order and it was entered in the customs book. Several other quantities were sold in the same manner.

The judgment of Bushe, C. J., is worthy of perusal. He seems to me to rest the case on the effect and operation of the delivery order. He says, at p. 684, the question is, "whether what was done converted the King's stores, which to a certain extent, and in a certain sense, were the warehouse of the seller, into the warehouse of the purchaser, in the same sense, and to the same extent. \* \* If a constructive possession be given to the vendee by the vendor, the right of stopping in transitu is precluded; and in this case the vendor had no possession himself but a constructive one, for the actual possession remained in the officer; and the vendor, by the order for delivery gave that which he had, subject to the claims of the Crown, to which the vendee then became liable instead of him."

He notices that the statute then in force made no provisions for transferring the goods in bond, but left the ordinary rules of law to apply, and enabling the officer to transfer the goods to a purchaser on request.

He distinguishes the case from *Northey v. Field*, on the ground that no "act was done by the consignor to vest the possession in the consignee after the goods had come to the King's warehouse, and before the stoppage in transitu had taken place."

Mr. Justice Jebb expressed a doubt whether *Northey v. Field* did not apply.

The judgment was against the right of stoppage.

In 1845, the case of *Croker v. Lawder*, 9 Ir. C. L. R. 21, was decided in the Irish Queen's Bench; the effect of delivery orders discussed, and judgment against the right to stop. But the facts are so different that I do not notice it further.

*Orr v. Murdock*, 2 Ir. C. L. R. N.S. 9, (1851,) was before the Irish Exchequer. The vendor had the spirits in the customs warehouse, and on sale gave to the consignee with the invoice a delivery order on the collector of customs to receive the duty, and deliver to the order of the consignee ten casks of spirit warehoused by the vendors. The consignee lodged the order with the collector and took out of store and paid duty on four casks, on warrants signed by the collector. The whiskey remained on the books, still in the name of the vendors, not transferred to the vendee. The vendee became bankrupt, and the vendors attempted to stop the residue.

It was proved at the trial that according to the usage of trade, the property in the goods passed by transfer of the delivery order, and that the storekeepers recognized the holder of such delivery order as the owner to whom alone they would give possession. The case was much discussed. It was ultimately decided, on the authority of *Haig v. Wallace*, already noticed.

Lefroy, B., says that there was an apparent conflict between *Haig v. Wallace*, and *Northey v. Field*, and if the facts were alike, from early prejudice, he should be disposed to follow the authority of Lord Kenyon.

He then examines *Northey v. Field*, and says that he considered Lord Kenyon, when he considered the right of stoppage in transitu to be open, so held on the ground that the only authority to the vendee to receive the goods was on the payment of the duty, that the goods were meanwhile *in custodia legis*, and that there existed no means of his obtaining a symbolical delivery, except by payment of the duty. But that this right may be put an end to by symbolical as well as actual delivery, and here an instrument was given which he thought amounted to a symbolical de-

livery. Taking this view of the decision of *Haig v. Wallace*, he did not think it conflicted with *Northey v. Field*.

*McEwan v. Smith*, 2 H. L. 309, discusses the effect of a delivery order, and seems to me not wholly in accord with some of these decisions.

Our text books are singularly barren as to the stoppage of goods in bonded warehouses, generally containing merely a reference to the facts of *Northey v. Field*, as in *Abbott on Shipping*, 11th ed., 428.

An unreported case of *Nix v. Olive*, is also noticed at p. 439.

The decision of Chancellor Walworth in *Mottram v. Heyer*, 5 Denio 629 (1846), was in favour of the right of stoppage. The purchaser had paid the freight, entered the goods in his name as owner, but had not paid the duties. It does not appear that the purchaser had warehoused them.

He says: "The removal of the goods from the vessel to the public store by the custom house officer until the consignors should entitle themselves to claim the possession and disposition of the goods by completing their entry by the payment of the duties, was merely substituting the public store in place of the vessel, as a place of deposit in the transmission of the goods to their place of destination."

He considers *Northey v. Field*, to be undistinguishable, followed by *Nix v. Olive*.

He then refers to the Scotch case, *Strachan v. Trustees of Knox & Co.*, and remarks, as he is quoted by the learned Chief Justice in *Lewis v. Mason*.

2 *Kent's Com.* 547, is quoted, "But if the goods have arrived at the port of delivery, and are lodged in a public warehouse, for default of payment of the duties, they are not deemed to have come to the possession of the vendee, so as to deprive the consignor of the right" to stop.

In the note to the edition of 1866, p. 547, it is said: "But where the goods have been placed in a public store under the warehousing system the transitus is at an end," citing *Mottram v. Heyer*.

This last proposition is certainly not universally correct.

I am unable to find any further notice of the Scottish case than in the extract in *Bell's Commentaries*, cited in *Lewis v. Mason*.

On the general principles governing this question, I may refer to the chapter in *Cross* on Lien and Stoppage in Transitu, 363, and to the judgment of Wood, V. C., in *Berndston v. Strang*, L. R. 4 Eq. 481, confirmed in Appeal, L. R. 3 Ch. Ap. 588, where Lord Cairns quotes approvingly the words of Lord Cranworth (then Baron Rolfe), in *Gibson v. Carruthers*, 8 M. & W. 321, at p. 328: "I consider it to be of the very essence of that doctrine" (Stoppage in Transitu) "that during the transitus the goods should be in the custody of some third person, intermediate between the seller who has parted with, and the buyer who has not yet acquired actual possession."

V. C. Wood speaks of a case, *Bohtlingk v. Inglis*, 3 East 381, as undoubted law.

There Lawrence, J., at p. 389, quotes the language of Lord Mansfield, in *Stokes v. La Riviere*, at Guildhall, 18th December, 1784: "No point is more clear than that if goods are sold, and the price not paid, the seller may stop them in transitu; *I mean in every sort of passage to the hands of the buyers.*"

On the whole, I have come to the conclusion that we should treat the case as governed by *Howell v. Alport*, following *Burr v. Wilson*.

All the cases agree in conceding the undoubted justice of the unpaid vendor's claim to be paid, instead of throwing his goods into the general assets of an insolvent estate.

I am not prepared, without some express binding authority, to limit this most just and equitable right of stoppage.

The goods have never come into the actual possession of the vendee. I cannot regard the collector of customs' possession of the goods as the possession of the vendee.

The goods could not come into his actual possession so long as the duties remained unpaid. The vendor had done nothing to divest his right of stoppage. No right had accrued to any third person. There is nothing in the fact

of a part having been taken out of bond by the vendee; and I think our judgment, for the residue of the goods, must be for the unpaid vendors.

GWYNNE, J.—It is impossible to distinguish this case from that of *Howell v. Alport*, 12 C. P. 375, which therefore must govern it. Nor is this case, in my judgment, at all distinguishable from *Burr v. Wilson*, 13 U. C. R. 478, for though it is said in that case that “on the arrival of the goods they were placed in the custom house store, and that no entry in the custom house was made by Fahey in respect of them, nor were any duties paid,” still the judgment of the Court proceeded upon the ground that nothing in the case stated shews the goods to have been in the actual possession of the vendee, so as to put an end to the transitus.

Now the entry here, although made by the vendee, was for the purpose of warehousing, not for the purpose of payment of the duties.

The object of entry for warehousing, and its effect appears to me to be equivalent to a declaration by the vendee that he is not prepared to pay the duties, and that he does not claim control over them until he shall enter them for payment of duties, and shall pay them.

At all events goods so entered are to the full extent equally out of the control and possession of the vendor, and in the custody, power, and control of the customs officers, as intermediate parties between the unpaid vendor and the vendee, so as to prevent the termination of the transitus, as if the goods had been warehoused on their arrival by the carrier or the customs officers without the intervention or appearance of the vendee in the matter.

So that, as it seems to me, the principle of *Burr v. Wilson* governs this case, equally with *Howell v. Alport*, and we cannot decide this case adversely to the plaintiff without overruling these others.

GALT, J.—A further consideration of this case satisfies me that it cannot be distinguished from the cases of *Burr*

v. *Wilson*, and *Howell v. Alport*. It is therefore concluded by authority, and I concur in the opinion that this appeal should be allowed.

*Judgment for plaintiff.*

### FIELD V. McARTHUR.

*Married women—Separate estate—Execution—Trustees—Necessary parties*  
—*Consol. Stat. U. C. ch. 73—35 Vic. ch. 16.*

To enable a married woman to be sued separately from her husband, under *Consol. Stat. U. C. ch. 73* and *35 Vic. ch. 16*, she must be proved to have separate property to her own use available by execution for the plaintiff's demand, which demand, if in the nature of a contract, must arise by reason of, and upon the faith of her having such separate property.

Under a deed of separation and settlement certain real and personal property was conveyed by the husband to trustees for the sole and separate use of the wife during her life; but that until the children, the issue of the said marriage, should attain the age of twenty-one years, the property was to be used for the maintenance and support of herself and children. And it was proved that the youngest child was only thirteen.

*Held*, that during the minority of the children, this was not such property as was available by execution for the plaintiff's demand; and that the Court could not pronounce judgment in the plaintiff's favour, to be enforced by him on the youngest child attaining twenty-one.

The plaintiff, suing the married woman upon her promissory note, was therefore nonsuited.

Per GWYNNE, J.—Where property is vested in trustees to the separate use of a married woman, such trustees are necessary parties.

DECLARATION on a promissory note for \$160, made by the defendant, dated the 1st of April, 1870.

The common counts were also added.

Pleas. To first count: 1. *Non fecit*. 2. Payment. To second count: 3. Never indebted. To the whole declaration: 4. That the time of making the alleged promissory note and of contracting the alleged debts was before the passing of an Act to extend the rights of property of married women, known as "The Married Women's Property Act, 1872"; and at the said time the defendant was, and still is the wife of one James McArthur.

The plaintiff joined issue on the 1st, 2nd, and 3rd pleas.

To the fourth plea he replied : that the debts in the declaration mentioned were the separate debts of the defendant. Issue.

The cause was tried before Morrison, J., without a jury, at Toronto, at the Spring Assizes of 1876.

At the trial it was proved that the defendant and her husband were living separate and apart, and that a deed of separation and settlement had been executed between them, which was put in.

The deed was dated the 14th November, 1864, and was made between the husband of the first part, the defendant, the wife, of the second part, and two persons named as trustees, of the third part, whereby—after reciting, amongst other things, an agreement between the husband and wife to thenceforth during the remainder of their joint lives to live separate and apart, in consequence of differences having arisen between them, and of the husband to convey certain real and personal property upon the trusts of the settlement—the husband then by the said deed conveyed to the said trustees the said real and personal property, to hold the same upon trust for the sole and separate use of the wife during her life ; but that until the children, the issue of the said marriage, should attain the age of twenty-one years, the property should be used for her maintenance and support, and for the maintenance, support and education of the children, until they should respectively attain the age of twenty-one years; and that after they should all attain such age, and during the residue of her life, for her sole and separate use. There was also a proviso that the said real and personal property should be liable to indemnify the husband against all debts that might be contracted by the wife, either for her own maintenance and support, or for the maintenance, support, and education of the children, with a covenant by the trustees that they would well and sufficiently indemnify and save harmless the husband against such debts and sums of money which the said wife should at any time, while she should live separate and apart from her husband, contract.

or owe to any person or persons whomsoever, whether for her own support or for the maintenance, support or education of the children.

It was proved that the youngest child would not attain the age of 21 years until the expiration of some eight years.

It was objected, on behalf of the defendant, that to enable the plaintiff to recover, it must be proved that the defendant was possessed of separate estate, whereas no such estate was proved.

The learned Judge entered a verdict for the plaintiff.

In Michaelmas term, November 24th, 1875, *Arnoldi* obtained a rule *nisi*, under the Law Reform Act, to enter a verdict for the defendant.

In Hilary term, February 16th, 1876, *McMichael*, Q. C., shewed cause. It was not necessary to aver or prove that the defendant was possessed of separate estate. It is only necessary that she should have separate estate when she is living with her husband, but not when she is living separately and apart from him, and in a position to act independently of him. All that it is necessary to prove is, that she has made a separate contract in respect of one of her separate debts. Assuming, however, that she must be possessed of separate estate, the estate vested in her by the deed of separation would constitute such separate estate: *McArthur v. Webb*, 21 C. P. 358; *Wagner v. Jefferson*, 37 U. C. R. 551. At all events, the plaintiff should be permitted to have judgment entered, so as to be able to enforce it on the children coming of age. See also the previous report of this case on demurrer, 25 C. P. 167.

*Arnoldi*, contra. The result of all the cases is, that to enable a married woman in any case to enter into a contract she must be possessed of separate estate, and must contract with reference to it. The estate here, was not separate estate within the meaning of any of the Acts respecting married women. The settlement shews that until after the majority of the children she only had the property for the support of herself and the children. It was clearly

not such estate as in equity before the passing of the Acts would have been deemed separate estate, and so liable to her contracts: *Webb v. McArthur*, 21 C. P. 358; *Wardle v. Claxton*, 9 Sim. 524; *Watson's Comp. of Equity*, vol. i. 372; *McCready v. Higgins*, 24 C. P. 233; *Merrick v. Sherwood*, 22 C. P. 467; *Wagner v. Jefferson*, 37 U. C. R. 551. The Court should not give judgment where there is no estate on which it can take effect.

August 29th, 1876. GWYNNE, J.—The true construction of the 9th section of 35 Vic. ch. 16, and of the cases decided in this Court upon that section, is, that it is in respect of the separate property which a married woman has *for her own use* the remedies are given both to and against her, the former for the recovery and protection of all such separate property, and the latter for the recovery of satisfaction *out of such* property, by suit against the married woman separately from her husband, in respect of any of her separate debts, engagements, contracts, or torts.

The true principle, as it appears to me, to proceed upon in actions against a married woman sued separately from her husband, is, to hold that the plaintiff undertakes to establish that the married woman, so sued, has, in the words of the 9th section of the Act, *some separate property for her own use*, which is available by execution for the plaintiff's demand, and that such demand, if in the nature of contract, arose by reason of, and upon the faith of her having such separate property.

The Act does not, as it appears to me, contemplate that a married woman can contract as a *feme sole*, except in respect of and in right of some separate property which she has to her own use. Nor does it contemplate relieving the husband of a married woman having no such separate property from all liability, and subjecting her alone to an action in respect of a contract made by her as his agent, or for a tort committed by her.

This appears to me to be the true principle to be collected from the Consol. Stat. ch. 73, taken in connection

with 35 Vic. ch. 16; and this is the principle involved in the judgments which have been rendered in this Court, in cases arising since the Act of 35 Vic. ch. 16, which, if erroneous, must be corrected by a Court of appellate jurisdiction.

The result, as applied to this case now before us, is that, in my judgment a nonsuit must be entered, because after a careful perusal of the deed and evidence in this case, I am of opinion that the defendant herself is by the deed made a trustee of the property which the deed speaks of as vested in trustees to her separate use, for the maintenance and support of the settlor's children, until the youngest shall arrive at 21, which will not be for some eight years yet to come. The property is not in fact held or to be enjoyed by the defendant as separate property to her own use, and upon principle as well as upon the authority of the case of *Wardle v. Claxton*, 9 Sim. 524, could not be sold in equity for the satisfaction of a claim against the defendant.

It has been suggested that, notwithstanding, the plaintiff should be permitted to recover judgment now in this action, although execution may not be available to him, and that the judgment may be enforced after the youngest child shall arrive at the age of 21, when the defendant, if living, will hold and enjoy a life estate in the property to her own use. But for such proceeding there is no precedent, nor anything analogous in any legal proceeding; nor can there be any reason why we should pronounce a judgment which may never be capable of being enforced. Such a proceeding would be contrary to the principle upon which, as I have stated, I think we ought to proceed in cases of this kind, namely, that the judgment should be against the separate estate and not *in personam*.

The statute of 1873, for the amendment of the law seems to me now to place this beyond doubt. It was only against the separate estate that the Courts of Equity proceeded before the passing of the Act 35 Vic. ch. 16; and, although we have held that this Act gives a remedy at law

where before there was only a remedy in equity, and against the wife sued separately from her husband, whereas before the husband was a necessary party to the proceeding in equity, still the Act does not give a remedy against any other property than such as before the Act was reachable in equity, and the spirit of the Administration of Justice Act of 1873, is that complete and final justice shall be done in whatever Court the suit against the married woman shall be instituted.

The 8th section of this Act provides, that for causing complete and final justice to be done in all matters in question in any action at law, the Court may pronounce such judgment as the equitable rights of the parties respectively require, and may as fully dispose of the rights and matters in question as a Court of Equity could do.

Since the passing of this Act, it appears to me that in actions brought against a married woman, sued separately from her husband, in respect of separate property enjoyed by her to her own use, the form of our judgment should be similar to that which would be pronounced in equity, namely, that it should be against the separate property by directing a sale of it, or so much thereof, if saleable, as will satisfy the plaintiff's demand, or by way of charge upon the property; and that, therefore, if there be no such property shewn to exist out of which satisfaction of the plaintiff's demand can in whole or in part be obtained, there can be no judgment in favour of the plaintiff, but he must be non-suited. And when it appears that the property of the married woman is vested in trustees upon special trusts to her use, it will, in my opinion, be necessary that the trustees should be made parties defendants, in order that an effectual judgment should be pronounced; for although the statute expressly authorizes the wife to be sued separately from her husband in such cases, it does not authorize property which is vested in trustees upon special trusts for her use, to be sold upon an execution issuing upon a judgment obtained against the *cestui que* trust alone.

Whether the wife alone is the only necessary party will,

as it appears to me, depend upon whether she is seized, or whether a trustee is seized upon trusts to her use of the property sought to be affected. When a trustee is seized to her use the reason of *Oakes v. Redford*, L. T. 20 May, 1876, p. 48, will equally apply under our statute, as under the English Act for the person so seized of the legal estate sought to be affected being made a party defendant.

HAGARTY, C. J.—I do not see my way to any other conclusion than that of my Brother Gwynne. I am not free from doubt, as I find a great and increasing difficulty in arriving at a clear conviction in some of the cases arising on the present position of married women in this province.

It seems to me that we cannot award execution against any of this property—that nothing could be sold as the defendant's property without prejudice to the minor children. The various trusts in the deed are set out with a somewhat perplexing abundance of legal expression, but, on the whole, it would seem that during the minority of the children, we cannot see any separate individual interest of the wife, which could pass to a purchaser without prejudice to the minors.

GALT, J., concurred.

*Rule discharged.*

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## CLOYES V. CHAPMAN.

*Promissory notes—Note made in New York discounted in Ontario—Usury—Foreign law.*

B. Bros. & Co., carrying on business at Morristown and Syracuse in the State of New York, and also at Brockville in Ontario, on the 11th October, 1872, at Morristown, signed a promissory note for \$500 at three months, payable at a bank at Syracuse to the order of C. F., a sleeping member of the firm, who at that time and until after the maturity of the note resided at Brockville. The note was endorsed by C. F., as also, but merely for the accommodation of the firm, by one H. H. and one A. B., both residents of Syracuse. The note so endorsed was handed to J. W. B., one of the firm, who resided at Brockville, and was there negotiated by him with a person named Harding at a rate exceeding 7 per cent., and Harding sold it to the plaintiff, who also resided in Brockville. The note was left by the plaintiff with a banker at Ogdensburg, N. Y., for collection, and at its maturity H. H. came over to Brockville and saw the plaintiff, who agreed to accept in renewal thereof the joint note of H. H., A. B., and the defendant at six months, which was accordingly made and deposited with the Ogdensburg banker, who then gave up the previous note.

*Held*, that the note of the 11th October, 1872, although drawn up and made payable in the State of New York, was in fact made and became a binding contract on all the parties thereto on its being discounted at Brockville, and must therefore be deemed a Canada contract and governed by our laws; and that therefore the law of New York, which made void any note discounted at a higher rate of interest than 7 per cent., or any note in substitution thereof, did not apply.

The plaintiff, therefore, having sued defendant on the last named note: *Held*, that he was entitled to recover.

This was an action brought by the payee against the maker of a promissory note, declared upon as made by the defendant on the 30th day of January, 1873, at Morristown, in the State of New York, whereby the defendant promised to pay to the plaintiff \$500, with interest, six months after date, but did not pay the same.

There were several pleas to the declaration, but the only material one was in substance that the note declared upon was a joint and several note, made by the defendant, one Henry Hooker, and one Alfred Baker, and was made by them and delivered to the plaintiff in the State of New York in substitution for another note theretofore, to wit, on the 11th day of October, 1872, made by a certain firm called Burrowes Brothers & Co., residents in and citizens of the State of New York, payable to one Chilian Ford or order,

whereby the said Burrowes Brothers & Co., promised to pay to the said Chilian Ford, or order, at the First National Bank in the city of Syracuse, in the said State of New York, three months after the date thereof, the sum of \$500, of the money of the said United States, which promissory note, endorsed by the said Chilian Ford, before any actual negotiation thereof, was also endorsed by the said Henry Hooker and Alfred Baker respectively, for the accommodation of the said Burrowes Brothers & Co., and, so endorsed, was discounted by the plaintiff for the said Burrowes Brothers & Co., at the sum of \$481, of the money of the said United States; and that it was agreed upon such discounting between the said Burrowes Brothers & Co. and the plaintiff that for forbearing and giving time for payment of the said sum of \$500 until the maturity of the said note, the said Burrowes Brothers & Co. should pay to the plaintiff the sum of \$19, which sum of \$19 exceeds the rate of interest allowable by the laws of the State of New York, and by the laws of that State is illegal, and usurious; and that by reason of the taking of such usurious interest, the said last mentioned note, and the note declared upon as given in substitution therefor, are by the laws of the said State of New York absolutely null and void, and that, save as aforesaid, there was no value or consideration for the note declared upon.

Upon this plea issue was joined.

The cause was tried before Gwynne, J., without a jury, at Brockville, at the Fall Assizes of 1875.

The note declared upon was produced, and was as follows:

“\$500.

“Six months from date, for value received, we promise to pay E. D. Cloyes or order, five hundred dollars, with interest.”

(Signed) “HENRY HOOKER,”

(Signed) “ALFRED BAKER,”

(Signed) “R. B. CHAPMAN.”

“Morristown, January 30th, 1873.

It appeared in evidence that the firm of Burrowes Brothers & Co. consisted of John Burrowes, Thomas J. Burrows, James W. Burrowes, and Chilian Ford, the last named being a sleeping partner. The firm carried on the business of liquor dealers at Morristown, Syracuse, and Lockport, in the State of New York, and they also kept a bonded warehouse in Brockville, in the Province of Ontario, where they kept liquors in which they dealt, in bond. The brothers, John and Thomas J. Burrowes, resided in the State of New York, James W. Burrowes resided in Brockville, and Chilian Ford sometimes in Morristown, a town in the State of New York, opposite Brockville, and sometimes in Brockville; but during the whole of the summer of 1872, and continuously until the month of December or January following, when the firm became bankrupt, he was residing in Brockville. In the month of October, the firm being pressed for money, prepared two promissory notes, bearing date the 11th October, 1872, the one for \$1,000 and the other for \$500, which were produced, and were as follows:

“\$1,000.

“MORRISTOWN, N. Y., October 11th, 1872.

“Four months after date, we promise to pay to the order of Chilian Ford at First National Bank, Syracuse, N. Y., one thousand dollars, for value received.

(Signed) “BURROWES BROTHERS & Co.”

This note was endorsed by Chilian Ford, describing himself as of Morristown, N. Y., and Brockville, Ontario; by Henry Hooker, describing himself as of Morristown, N. Y.; and by Alfred Baker, describing himself as of Morristown, N. Y.

The other note was as follows:—

“\$500.

“MORRISTOWN, N. Y., Oct. 11th, 1872.

“Three months after date, we promise to pay to the order of Chilian Ford, at First National Bank, Syracuse, N. Y., five hundred dollars, for value received.

(Signed) “BURROWES BROTHERS, & Co.”

This note was also endorsed by Chilian Ford, Henry Hooker, and Alfred Baker, each respectively describing himself as on the endorsement of the note for \$1,000.

These two notes, so endorsed, were placed in the hands, of James W. Burrowes, the partner who resided in Brockville, for the purpose of his raising money upon the notes for the use of the firm, Hooker and Baker being indorsers merely for the accommodation of the firm.

James W. Burrowes took the notes, as he had frequently done with others, to a person named Harding, residing in Brockville, and offered them to him, together with other notes, to which latter it is unnecessary to refer, for sale, and did sell the above two notes to Harding at a sum realizing to Harding more than seven per cent. He sold them afterwards to the plaintiff.

It was proved and admitted, that by the law of the State of New York no interest can be taken in the State of New York upon any contract exceeding the rate of seven per cent. per annum, and that all contracts, bills, notes, and evidences of debt, whereon or whereby more than seven per cent. is taken or reserved, or agreed to be taken or reserved, is void in whose hands soever it may be held, and that any substituted note given for one tainted with usury is void.

A Mr. *George Morris*, a practising counsel at Ogdensburg, in the State of New York, for twenty-five years, stated the law of the State of New York to be, that if a note be made in Canada, payable in the State of New York, and negotiated in Canada at a rate of discount exceeding seven per cent. per annum, it will be avoided in the State of New York, and cannot be recovered upon there; and he referred to *Clayes v. Hooker*, an action brought upon the above note for \$1,000, reported in 11 Hun N. Y. 231; and he cited also other cases decided in the Courts of the State of New York in support of his opinion.

He said, however, that it would be different, if the evidence shewed that the parties intended the note to be a Canada contract, although payable in the State of New York.

Mr. *Bennett H. Vary*, a counsellor practising at Ogdensburg since 1849, stated that the law of the State of New York was as stated by Mr. Morris, but he attributed the principle to the *lex fori*, which he was of opinion governed in the question of usury; and he cited, as an authority in support of his opinion, *Willis v. Cameron*, 12 Abbott 245; *Western v. Genesee Mutual Ins. Co.*, 12 N. Y. 258, and *Backman v. Jenks*, 55 Barbour 468.

It also appeared in evidence that the plaintiff left the note for \$500, dated the 11th October, 1872, in a bank at Ogdensburgh for collection, and that while it was there, and after the maturity of the note, Mr. Hooker, who had endorsed it, came over to Brockville, where the plaintiff, who was the holder of it, resided, to make an arrangement with him about taking it up; and there, in Brockville, he made an arrangement with the plaintiff, whereby the plaintiff agreed to give up to Mr. Hooker the note for \$500 of the 11th October, 1872, in consideration of his receiving a note to be made by Mr. Hooker and Mr. Baker, payable at six months with interest; and it was agreed between them, that, upon Mr. Hooker delivering such new note to a Mr. Merian, the banker in Ogdensburg who had in his charge the note for \$500 of the 11th October, 1872, the latter note should be given up to Mr. Hooker.

In pursuance of this agreement, Messrs. Hooker and Baker made the note now in suit, which they procured the defendant Chapman to join them in making, and handed it to Mr. Merian, who received it upon behalf of the plaintiff, in pursuance of the agreement made between Hooker and the plaintiff at Brockville, and thereupon Mr. Merian, as plaintiff's agent, gave up to Mr. Hooker the note of the 11th October, 1872. Mr. Hooker's object in making this arrangement, was to protect himself and Mr. Baker by taking up the note of the 11th October, 1872, with the view of looking to Mr. Ford, the payee thereof, for payment, the makers having become bankrupt.

The learned Judge entered a verdict for the plaintiff.

In Michaelmas term, November 18, 1875, *S. Richards*, Q. C., obtained a rule *nisi* under the Law Reform Act, to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant, on the ground that the verdict was against law and evidence, in this, that the validity of the note sued on, and of the note it was given to renew or replace, depended on the law of the State of New York, and that under said law neither note was valid: that under said law both the said notes were invalid and void for usury, and that said law governed the case; also, that the first note being void for usury, the note sued upon was without consideration; and that upon the facts disclosed at the trial, the plaintiff was not entitled to recover; and why the defendant should not have leave to amend his plea, so as to agree with the evidence given at the trial as to usury, want of consideration, and other facts.

In Hilary term, February 9th, 1876, *Bethune*, Q. C., shewed cause. No doubt, according to the law of the State of New York, the negotiation of a note for an usurious consideration makes the note void, as well as any note given in substitution of it. This, however, would only apply to contracts made in the State of New York, but clearly could not apply to contracts made in Canada. The evidence shews that the whole contract, which is claimed to be usurious, was made in Canada, namely, at Brockville, and therefore it must be governed by the laws of Canada, and according to our law it is a valid and subsisting note: Revised Statutes of New York, vol. ii., 181, 2; *Armstrong v. Gibson*, 31 Wis. 61; *Junction R. W. Co. v. Bank of Ashland*, 12 Wallace 226; *Andrews v. Pond*, 13 Peters 65, 78; *Dewolf v. Johnson*, 10 Wheaton 383; *Thompson v. Powles*, 2 Sim. 194; *Story on Bills of Exchange*, 4th ed., sec. 149; *Bank of Montreal v. Reynolds*, 25 U. C. R. 352.

*S. Richards*, Q. C., contra. The original note was made in Morristown, in the State of New York, and was payable at Syracuse in the same State. The original contract was therefore entirely made in the State of New York. But even assuming the note to have been made at Brockville,

it was to be paid at Syracuse, and therefore the contract was to be performed there. The rule is, that the contract is to be governed by the law of the place of performance. The contract here, therefore, is governed by the law of the State of New York. The original note, therefore, as well as the one now sued upon, which was given in substitution of it, is, according to the law of that State, void: *Story on Bills*, secs. 146, 147, 158; *Don v. Lippman*, 5 Cl. & F. 1; *Phillimore's International Law*, 2nd ed., vol. iv. 662, 3; *Curtis v. Leavitt*, 15 N. Y. 88; *Jewell v. Wright*, 30 N. Y. 259; *Cutler v. Wright*, 22 N. Y. 472; *Clayes v. Hooker*, 11 Hun N. Y. 231.

August 29, 1876. GWYNNE, J.—I propose to consider the case just as if the plea had been that the usury complained of was taken on negotiation of the note with Harding instead of with the plaintiff.

I entertained no doubt at the trial, and would have so found as a fact that, and I am still of opinion, and am prepared if necessary to find as a fact, that Mr. Chilian Ford endorsed all the notes bearing date the 11th October, 1872, at Brockville. His contract, as endorser, not only in substance but in fact was made and entered into in Brockville.

Confining myself now to the note for \$500 of the 11th October, 1872, which is the only one that it is necessary to refer to for the purpose of this decision, I am of opinion that the contracts of all the respective parties thereto were made and entered into in Brockville, where first the piece of paper upon which the note was written assumed the character of a note; and that the note, therefore, was a note made and endorsed in Canada. When the piece of paper upon which the names of maker, payee, and endorsers, were written was placed in the hands of James W. Burrowes, one of the makers, to be negotiated, there was no obligation or promise in existence available in favour of or against any of the parties whose names were on the piece of paper. James Burrowes was constituted the agent of

all the parties whose names were on the piece of paper to impress upon it the character of a promissory note, and that character was first impressed upon it when he in Brockville sold the note to Harding; then the contracts of all the several parties first came into existence.

We could have no difficulty either under the circumstances, if necessary, in holding that the parties to that negotiation intended that the contract should be treated as a Canada contract, although payable in the State of New York.

If, as was said by Mr. Morris, the law of the State of New York be such that the note, although made and discounted in Canada at a rate legal there, although illegal in the State of New York, would be held to be void in the State of New York if the parties intended the contract to be treated as a contract of the State of New York, but not void if they intended it to be treated as a Canada contract, then in the interest of justice and of commerce, we should, acting as jurors, infer that the intention of the parties was such as should consist with the validity of the contract, and not such as would invalidate it; but that Chilian Ford's contract was a Canada contract there can be no doubt.

In *Story's Conflict of Laws*, sec. 314, Mr. Justice Story puts the case of a negotiable bill of exchange, drawn in Massachusetts on England, endorsed in New York, and again by the first endorsee in Pennsylvania, and by the second in Maryland, and the bill is dishonoured; and he asks what damages will the holder be entitled to, the law as to damages in these States being different; and he replies that in each case the *lex loci contractus* is to govern. The drawer is liable on the bill according to the law of the place where the bill was drawn, and the successive endorsers are liable on the bill according to the law of the place of their endorsement, every endorsement being treated as a new and substantive contract.

And again, in section 315, he says, "It has sometimes been suggested that this doctrine is a departure from the

rule that the law of the place of payment is to govern. But, correctly considered, it is entirely in conformity with the rule. The drawer and endorsers do not contract to pay the money in the foreign place on which the bill is drawn; but only to guarantee its acceptance and payment in that place by the drawee; and, in default of such payment, they agree upon due notice to reimburse the holder in principal and damages at the place where they respectively entered into the contract."

And in a note it is said "*Pardessus* has discussed this matter at large. He adopts the general doctrine here stated, that the law of the place of each endorsement is to govern, as each endorsement constitutes a new contract between the immediate parties."

This, also, is the principle of the decision in *Gibbs v. Fremont*, 9 Ex. 25.

Chilian Ford's contract, therefore, being wholly a Canada contract, made in Canada and broken in Canada, when the plaintiff agreed to give up the note upon which Ford was an endorser, he gave full and ample consideration for the making of the note now sued upon, and the defendant must therefore fail upon this plea.

But, indeed, the *Providence County Savings Bank v. Frost*, 50 Howard 173, and *Tilden v. Blair*, 21 Wallace 241, are decisions, the former of one of the Courts of the State of New York, and the other of the Supreme Court of the United States, to the express point that the contracts of all the parties to the note in question of the 11th October, 1872, were Canada contracts.

No doubt, the legal way to prove the law of the State of New York, is to call a skilled witness, and to examine him *vivâ voce*; but referred as we are so frequently to decisions in the American Courts, the reports of which are taken in our Public Library at Osgoode Hall, we may, I think, safely be permitted in cases of this kind to refer to the reported cases, and to act upon them, especially when we find them to accord with our own view of the law.

Upon the point in which I differ with Mr. Morris's opin-

ion, it is not properly speaking upon a question as to what is the law of the State of New York. The law of that State is the same as our own law upon the point, and is, that the construction and obligation of contracts are governed by the *lex loci contractus*: *Allen v. Merchants' Bank of New York*, 22 Wendell 215; *New York Dry Dock Co. v. American Life Insurance Co.*, 3 Sandf. Ch. R. 215. But the question as to what country is the *locus contractus* in each particular case is not a question of foreign law, it is a question of fact to be determined upon the evidence of the circumstances attending the creation of the note, and is not to be proved by the evidence of a foreign jurist. It is a point upon which we feel under no obligation to yield to the *opinion* of any witness.

By a reference to *Clayes v. Hooker*, 11 Hun N. Y. 231, I find that the Court proceeded upon the *assumption* that the note was made in the State of New York. What were the facts which were proved in that case we do not know. They were said not to have been excepted to. The point upon which I rely in this case as establishing that the contracts involved in the note of the 11th October, 1872, were all made in Canada, does not appear to have been adverted to. Agreeing with the law as stated there, that the obligation of a contract is to be governed by the law of the place where it is entered into, I decide this case upon the ground that the contract involved in the note for \$500 of the 11th October, 1872, was a Canada contract, and if in this we differ from the Court which decided the case of *Clayes v. Hooker*, we have the satisfaction of thinking that it may more properly be said to be on a point of ordinary matter-of-fact, than upon a question of law that we differ. What the law would be if the note had had currency and existence as a note made and endorsed for value in the State of New York, before it was discounted by a subsequent holder in Canada at a rate of interest exceeding seven per cent., we are not called upon to express an opinion, although, I confess, I find it difficult to understand how a contract for the taking of ten per cent. upon the discount

of such a note in Canada, such contract being a contract wholly independent of the contract involved in the making of the note, can ever be said to be a contract in violation of the law of a State in which *ex concessis* the contract is not made, or upon the principle of the application of the *lex loci contractus*, can be treated as void in the foreign State.

The plaintiff will retain his verdict.

HAGARTY, C. J.—The decision of the Supreme Court of the United States in *Tilden v. Blair*, 21 Wallace 241, (1874,) is very much in favour of the plaintiff's view, that these notes—namely, that in suit, and that for which it was given—are to be looked on as Canadian contracts, and governed by our law.

Pelton, in Chicago, drew a draft on Tilden & Co., residing in New York State, and they accepted solely for his accommodation and to enable him to raise money on it in carrying on his business, payable at the Bank of North America, New York. They sent it back accepted to Pelton, who had it discounted in Chicago to a *bona fide* holder, ignorant of the acceptance being for accommodation.

By New York law, everything over seven per cent. was usurious, and Pelton had sold it to a Chicago broker at a greater discount than seven per cent. Ten per cent. was lawful in Chicago. The defence was usury.

Mr. Justice Strong, delivering the judgment of the Court, says, at p. 246: "That the contract upon which the suit was brought was made in Illinois must be considered as established by the findings of the Circuit Court. It is true the defendants formally accepted the draft in New York, and promised to pay at a bank in New York, but there was no operative acceptance until the draft was negotiated. \* \* Pelton, the drawer, for whose accommodation the acceptance was given, was thus constituted the agent of the acceptors to give effect to their action. While the draft remained in his hands it was no binding contract. \* \* It has long been settled that the liability of an acceptor does not arise from merely writing

his name on the bill, but that it commences with the subsequent delivery to a *bona fide* holder or with notice of acceptance given to such holder. \* \* Nor is the law of the contract changed by the fact that the acceptance was made payable in New York. \* \* It is a controlling fact that before the acceptance had any operation, before the instrument became a bill, the defendant sent it to Illinois for the purpose of having it negotiated in that State—negotiated, it must be presumed at such a rate of discount as by the law of that State was allowable.

\* \* It is plain, therefore, that the contract is an Illinois contract, and that the rights and liabilities of the parties must be determined according to the law of that State.”

A statute of Illinois is referred to as to contracts made there, but payable elsewhere ; but I understand the parts of this judgment here cited are on the general law.

*Byles* on Bills, 12th ed., 151 (1876), and *Chapman v. Cotterell* 34 L. J. N. S. Ex. 186 (1865), may be referred to.

The present defendant, Chapman, had no previous dealing with the plaintiff. His note, now sued on, is a promise to pay the plaintiff, not at any particular place, but generally. the plaintiff being known to be a resident of Canada. To discharge himself from this note, I presume the defendant would have had to pay him wherever he could find him—naturally, where he resided.

Now, the consideration for the defendant making this note, was the giving up of the preceding note for the same amount, and on that note the plaintiff would, according to my Brother Gwynne's finding, at all events, have had recourse against the co-maker, James W. Burrowes, a resident of Canada, and the first issuer of the note, and also against Chilian Ford, said to have been also such a resident.

It is not easy to see what defence they at least could have urged in a suit by the plaintiff in our Courts.

On this short ground alone, that the note in suit was given to retire a note on which the plaintiff had a good

claim against other parties in Canada, unaffected by any usury law, it seems to me that the defence fails.

On the general law, *Allen v. Kemble*, 6 Moore P. C. 321, may be referred to.

GALT, J., concurred.

*Rule discharged.*

### COCKBURN V. SYLVESTER ET AL.

*Warehouse receipts—Rights of private persons to take them—What constitutes a debt—Specific appropriation of goods—Conversion—22 Vic. ch. 20; C. S. C. ch. 54.*

On the 29th June, 1872, C., of the firm of J. F. C. & Co., who had stored a quantity of coal with defendants, for which defendants were to give warehouse receipts on certain terms, applied to the plaintiff for his acceptance for the firm's accommodation of two bills of exchange, one for \$1500, and the other for \$900, offering to give him defendants' warehouse receipt for 400 tons of coal as security therefor. The plaintiff agreed to accept on these terms, of which C. notified the defendants, obtained their receipt, dated 27th June, 1872, and endorsed it over to the plaintiff, who then accepted the bills on the faith of this receipt. At the maturity of the bills the plaintiff retired them, by a renewal of and paying at maturity the \$1500 one, and by giving H., one of the defendants, into whose hands the one for \$900 had come, his notes therefor, which were not paid. On the 28th November, a writ of attachment issued against J. F. & Co. On the 30th, they made an assignment in insolvency, and on the same day the official assignee took possession of the coal. On the 14th December, the plaintiff went to defendants and asked for the coal, but defendants stated that they could not give it to him as the assignee had taken possession of it; and he subsequently called at different times, but received in effect the same reply. The coal which was proved to have been worth between \$5 and \$6 per ton, was afterwards sold by the assignee at an average of \$3.80 per ton. The plaintiff, on the 28th February, 1876, brought an action of trover against defendants for their refusal to deliver.

*Held*, that under 22 Vic. ch. 20, as consolidated in Consol. Stat. C. ch. 54, private persons, and not banks alone, are entitled to take warehouse receipts, and that such right has not been interfered with by subsequent legislation.

*Held*, also, following *Re Coleman*, 36 U. C. R. 559, the plaintiff's acceptance constituted a debt due by Coleman & Co. to the plaintiff, when the receipt was endorsed, within the meaning of the Statute.

*Held*, also, that there was a sufficient demand and refusal to enable the plaintiff to maintain the action, and that it was so made during the currency of the receipt.

*Held*, also, that there was no necessity for any specific appropriation of coal to answer the receipt; and that at all events defendants could not set up this objection.

DECLARATION. First count: On a warehouse receipt for 400 tons of coal, made by defendants to Coleman & Co., who endorsed and transferred the same for valuable consideration to the plaintiff: alleging that the plaintiff became the lawful holder thereof, and entitled to the delivery of the said coal: that he duly presented the said receipt as endorsed as aforesaid, and demanded the delivery of the said coal, and offered and was willing to pay any charges that defendants might have against said coal, yet defendants did not deliver the same or any part thereof.

Second count: To the same effect, setting out the receipt. Common counts were added.

Pleas. To the first and second counts: 1. Denying the agreement; 2. That the plaintiff was not the lawful holder of the warehouse receipt; 3. That the said Coleman & Co. did not duly endorse and transfer the said receipt to plaintiff.

To the first count: that the plaintiff did not offer to pay defendants' charges on the said coal.

To the second count: to the same effect.

To the common counts: never indebted, and payment. Issue.

The cause was tried before Hagarty, C. J., without a jury. at Toronto, at the Spring Assizes of 1876.

It appeared that Coleman & Co. were coal dealers, and had stored a quantity of coal with the defendants, who were warehousemen, the defendants to give warehouse receipts therefor, and to be paid a commission of  $2\frac{1}{2}$  per cent., Coleman & Co. also paying the rent and taxes.

On the 29th June, 1874, J. F. Coleman, of the firm of Coleman & Co., applied to the plaintiff, and asked him to accept for their accommodation two bills of exchange, one for \$1,500 at 100 days, and the other for \$900 at 70 days, offering to give him a warehouse receipt for coal sufficient to cover his risk. The plaintiff agreed to accept on these terms, and Coleman then went to defendants and informed them of the arrangement he had made with the plaintiffs, and obtained their warehouse receipt, dated 27th June,

1874, for 400 tons of coal, in favour of Coleman & Co. Coleman then returned with the receipt to the plaintiff, to whom he endorsed it over and delivered it, and the plaintiff then accepted the bills, both payable at the Quebec Bank, Toronto.

The plaintiff stated that he did so entirely on the faith of the receipt, which was as follows :—

No. 249.


“ WAREHOUSE RECEIPT.

“ Church Street Wharf, May 15th, 1874.

“ Received in store from vessels, deliverable only upon surrender of this receipt, duly endorsed, and payment of charges, to the order of J. F. Coleman & Co.

Marks.	Description of Property.
[400]	Four hundred tons of coal.

“ This is to be regarded as a receipt under the provisions of the statute 22 Vic. ch. 20, being 22 Vic. ch. 54 of the Consolidated Statutes of Canada, and the amending statute, 24 Vic. ch. 23.

 “ Not insured and subject to charges only.

(Signed) “ SYLVESTER BROS. & HICKMAN.

“ Deliver to order of Isaac Cockburn.

(Signed) “ J. F. COLEMAN & Co.”

At the maturity of the acceptances, the plaintiff renewed the \$1,500 one at 45 days, and on its then maturing on the 27th November, the plaintiff retired it. The \$900 was given by Coleman to Hickman, one of the defendants, for a debt he owed him, and he retired it by giving his notes for it, which have not been paid.

On the 28th of November, a writ of attachment issued against Coleman & Co., and on the 30th November they made an assignment in insolvency, and the plaintiff as a creditor received a notice of the assignment.

On the 14th December the plaintiff went to the defend-

ants' office, and stated that he held the warehouse receipt, and wanted to get the coal; but defendants stated that the assignee had taken possession of it, and that it was not in their power to deliver it. The plaintiff subsequently returned and asked about the coal, and was informed by defendants that the matter was the same as before. In a few weeks he went again to defendants, and found that nothing had been done, and subsequently called at different times to know when he could get the coal, informing defendants that the bank who held the \$1,500 bill were pressing him for payment. He asked defendants if they could not give bonds so as to satisfy the Court, and handle or make sale of the coal for his best advantage; but they informed him, after making enquiries, as they stated, of their lawyers, that this could not be done. No charges appeared to have ever been made by defendants on the coal.

It appeared that plaintiff had deposited the receipt in a bank, but that it was always under his control, and that whenever he went to defendants he had the receipt with him, and was ready to deliver it to them on receiving the coal. The coal was afterwards sold by auction on behalf of the assignee at an average of \$3.80 per ton. The evidence given on behalf of the plaintiff shewed the coal to have been worth between \$5 and \$6 per ton. The defendants stated it to have been worth \$4.

Mr. *Boustead*, the assignee, proved that he was put in possession of the coal by the sheriff on the 30th of November, 1874, and that he sold under a Judge's order a portion of it for rent and taxes, and the residue on behalf of the creditors.

The defendants denied that any formal demand of the coal had ever been made.

It appeared that this action was commenced on the 28th February, 1876.

On behalf of the defendants a nonsuit was moved for, on the grounds: that there was no evidence of presentation of the receipt or demand of the coal, or offer to give up the receipt: that there was no evidence of any debt due

by Coleman to the plaintiff, within the meaning of the statute: that no endorsement could give the plaintiff any right against defendants: that there was no conversion, as there was no specific or divided property then there: that at the time alleged the property was not under defendants' control, it being in the assignee's charge: that by the Confederation Act, and subsequent legislation, the right of private persons under Consol. Stat. C. ch. 54, to take assignments of warehouse receipts, as in the present case, has ceased: that the warehouse receipt expired in six months, which had elapsed before the commencement of this suit; and that no proper steps were taken to realize in time before the action was commenced.

The learned Chief Justice entered a nominal verdict for the plaintiff for \$1,600, being for 400 tons at \$4 a ton, leaving the whole matter for the Court.

In Easter term, May 18th, 1876, *Bigelow* obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendants.

During the same term, May 29th, 1876, *Osler* shewed cause. The result of the evidence is, that the plaintiff demanded the coal, and that the defendants refused to deliver it up. The plaintiff always had control of the receipt, and had it with him when he went to demand the coal, and was ready to deliver it up when he got the coal. There was clearly a sufficient demand and refusal to constitute a conversion. As to there being no appropriation to answer the receipt, it is not necessary that there should be, and, at all events, the defendants cannot deny the effect of their receipt. There was a debt due within the meaning of the statute. The acceptance of the bills would constitute such a debt, and this has been expressly so held in *Re Coleman*, 36 U. C. B. 559. As to there being no power to private persons to accept warehouse receipts, the Consol. Stat. C. ch. 54, is a consolidation of 22 Vic. ch. 20, and that Act expressly gives power to private persons to accept

such receipts, and this has not been interfered with by subsequent legislation. As to the receipt only being in force for six months, there was a sufficient demand within the time, and this is all that is required.

*Bigelow*, contra. There was no sufficient demand or presentation of the receipt. There must be an express demand and refusal; also by the terms of the receipt it must be surrendered up and the charges paid, and there is clearly no evidence of any offer to deliver up the receipt or pay the charges. The acceptance of the bills would not constitute a debt within the meaning of the statute, and in this respect the case of *Re Coleman*, 36 U. C. R. 559, is erroneous. There also should have been a specified appropriation of coal to answer the receipt, and therefore no property in the coal ever passed to the plaintiff. The endorsement of the receipt did not vest a right of action in the plaintiff, but merely gave him a lien: *Glass v. Whitney*, 22 U. C. R. 290. Also, the receipt had ceased to have any effect, the six months allowed by the statute having expired; and even if a demand were sufficient to comply with the statute, there was no sufficient demand here. Moreover, under the legislation now in force no power is given to private persons to take warehouse receipts. This comes within the class of subjects vested by the Confederation Act in the Parliament of Canada, and under the Confederation Act the existing laws were only to remain in force until repealed. The 34 Vic. ch. 5, D., was in fact a repeal of the legislation so far as respects private persons. That Act merely referred to banks, without any mention being made of private persons; and sec. 34 of the Interpretation Act shews that this would constitute such repeal.

August 28th, 1876. HAGARTY, C. J., delivered the judgment of the Court.

Some of the points in this case were raised and discussed in *Re Coleman*, 36 U. C. R. 559. But one of the chief points now urged does not seem there to have been discussed

viz., that by the statute law existing in June, 1874, when the plaintiff received the warehouse receipt, he, as a private person, had none of the rights originally conferred by the Consol. Stat. C. ch. 54, and 24 Vic. ch. 23.

This chapter 54 is an Act respecting incorporated banks, and nearly all its provisions refer to banks and banking. Sec. 8 declares that, notwithstanding anything to the contrary in any bank charter, warehouse receipts may, by endorsement by the owner, &c., be transferred to any bank, "or to any person for such bank, or to any private person or persons, as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, *or any debt due to such private person or persons*, and being so endorsed shall vest in such bank or private persons," &c.

Section 9 declares that no such transfer of any receipt &c., shall be made "to secure the payment of any bill, note, or debt, unless such bill, note, or debt be negotiated or contracted at same time with the endorsement of the receipt," &c.

These provisions are copied from 22 Vic. ch. 20, passed in 1859, the same year as the Consolidated Act, and the title is, "An Act granting additional facilities in commercial transactions." And the preamble is, "For the purpose of affording additional facilities in commercial transactions." Then follows the enactment worded as in the Consolidated Act, ch. 54. No general provision as to banking is in this first Act.

In 1861, 24 Vic. ch. 23, amends the Consolidated Act. Section 2 provides that all advances made on the security of such receipts, &c., "shall give to the person, bank, or other body corporate making such advances, a claim for the repayment of such advances," &c., "by preference over the claim of any unpaid vendor."

In 1867, 31 Vic. ch. 11, respecting banks, was passed, to continue in force until 1st January, 1870. Sec. 7 repeats in substance sec. 8 of the Consolidated Act, with words extending it to the Dominion; also repeating the amendments of the Act of 1861.

The Act of 1870, 33 Vic. ch. 11, continues this last Act till the end of the session of 1872.

A General Banking Act was passed in 1871, 34 Vic. ch. 5. It declares that "It is desirable that the provisions relating to the incorporation of banks, and the laws relating to banking, should be embraced, as far as practicable, in one general Act." Sec. 76 repeals the 31 Vic. ch. 11, Act of 1867, at the end of the session of 1872.

Section 46 and following sections provide fully for banks acquiring and holding warehouse receipts, &c., as collateral security for bills and notes discounted, or for any debt due under any credit opened, or liability incurred, by the banks for or on behalf of the owner or holder of the receipt, &c.

Enlarged powers are given to the banks, but all reference to private persons seems omitted.

It was pressed upon us that as the right to private persons was given only in connection with powers to banks, and in an Act professing to relate wholly to banks, the subsequent legislation must be considered as in effect abrogating such rights. It was not urged that the Consolidated Act had ever been in terms repealed.

I am of opinion that this objection fails, and that the rights granted to private persons have not been interfered with. There should be no implication, I think, to take away the right so directly granted in the words of the first statute: "For the purpose of affording additional facilities in commercial transactions," and not merely for the benefit of banks.

The next objection to be considered is, the second taken in the rule—that there was no debt due by Coleman to the plaintiff when the receipt was endorsed, within the meaning of the statute. Coleman applied to the plaintiff on the 29th June, 1874, to accommodate him by accepting two drafts drawn by Coleman on him. This the plaintiff agreed to do on the security of the warehouse receipt which Coleman brought to him signed by the defendants, and which Coleman endorsed to the plaintiff at the same time. On this the plaintiff accepted two bills, one for

\$1,500 payable in 100 days; the other for \$900 at 70 days, both dated 29th June, both payable at the Quebec Bank, Toronto. The warehouse receipt is dated 27th June, 1871. The \$1,500 draft was renewed for 45 days from 10th October, 1874, drawn by Coleman, accepted by the plaintiff, payable at another bank. It matured November 27th, and was retired by the plaintiff. The \$900 acceptance was given by Coleman to Hickman, one of the defendants, for a debt due him, and the plaintiff has retired it by giving his own note for it, not yet paid.

The defendants were aware of this dealing with the plaintiff and that the receipt for 400 tons of coal given by them to Coleman was to be endorsed by him to the plaintiff as the latter's security. It was sworn that there was at that time coal sufficient. An order for attachment in insolvency was made against Coleman on the 28th November, 1874, and he made a voluntary assignment, November 30th, 1874. In December, at all events, between the 14th and 17th, the plaintiff applied to the defendants for the coal, and again many times thereafter. The assignee of Coleman had taken possession of all the coal on the defendants' wharf. Various orders were made by the Insolvent Court respecting it. A history of the case may be found in *Re Coleman*, already cited, where, on the petition of these defendants, in appeal to the Queen's Bench, the orders made below were varied. The nature of the arrangements between Coleman and these defendants is fully stated, and the defendants proved the granting by them to Coleman of this receipt, with several others.

The chief difficulty was created by a claim of Roberts, an American dealer, who had sent to Coleman on credit some 1,500 tons of coal in November, most of it just before the insolvency, and all long after the receipt now in question was given.

It was urged there, as here, that the plaintiff was no creditor of Coleman's, merely an accommodation acceptor, and not within the statute.

The Court expressed some doubt on this very important

point, but finally, after discussion, decided, at p. 581:—"We have, therefore, come at last to the conclusion that the receipts were given to secure transactions which were covered by, and are within, the terms of the Warehousing Act."

We think we must follow this decision of a Court of Concurrent Jurisdiction on this very question, leaving it to the defendants, if so advised, to take the opinion of a Court of Error. We follow this view of the law without discussion.

It was urged at the trial and in term that there had been no sufficient demand of the coal, or refusal to deliver. We think the clear inference from the evidence is that the plaintiff, from his first visit to defendants in December, did demand his coal, and that the only excuse made by defendants, and the only answer he could get from them, was, that the coal was in the hands of the assignee of Coleman, and, therefore it was not in their power to deliver it. The defendants were fully aware of the plaintiff's position. We think there was evidence of demand and refusal sufficient to support the claim, the whole substance of defendants' answer being, "We cannot give it to you, because Coleman's assignee is in possession."

We think the plaintiff applied for the coal within six months from the endorsation of the receipt to him, and from the dates thereof respectively, 27th and 29th June. The assignee, Mr. Boustead, declared that he held possession of the coal against the defendants, having taken possession on the November 30, 1874.

The difficulty seems to have been all created by the peculiar arrangements between Coleman and these defendants, by which, in effect, he retained the management and control of the coal, he transferring to defendants the legal estate in the coal yard and premises to enable them to give warehouse receipts to Coleman, which he could use or raise money on. He was to pay them  $2\frac{1}{2}$  per cent. commission. After the insolvency some of the coal was sold for rent, and some for taxes, at apparently very low prices. Orders

were made in the Insolvent Court, and after the appeal to the Queen's Bench Roberts was allowed a certain portion, and the assignee paid over to defendants, by order of Court, \$4649.96. The defendants, appellants in the Queen's Bench, claimed to have given receipts for 2,700 tons of coal, including the plaintiff's 400 tons. The Queen's Bench directed that after giving up Roberts's coal, so far as it could be identified, the residue, to the extent of 2,700 tons should be given up to the defendants.

The defendants are very heavy losers in the matter, and it is to be feared that a most unhappy method of ascertaining and arranging the rights of the several parties was resorted to in the Insolvent Court. We cannot see how, as regards the rights of the plaintiff, as a *bona fide* holder of a warehouse receipt, signed by defendants, the latter can shelter themselves under any of the defences set up.

The plaintiff should not be prejudiced by any peculiar arrangement entered into between them and Coleman, or by the acts of Coleman's assignee. Under the statute the coal became the plaintiff's property from the time of the endorsement of the receipt to him. It is clear that at that time there was coal belonging to Coleman in the defendants' hands on which the receipt could operate. Coleman had the right to have it transferred to him in payment of the debt secured. This right might pass to his assignee, but no further or greater right.

As to the objections taken in the rule of there being no ascertained quantity of coal for the receipt to operate on, it seems to me that to allow it to prevail must be destructive of the whole system of advances on warehouse receipts. The warehouseman declares that he has a certain quantity of goods in store. We cannot see how it lies in his mouth to raise any question that the quantity mentioned may be mixed with a much larger quantity, and that on that account he is excused from delivering any: *Coffey v. Quebec Bank*, 20 C. P. 110, and in Appeal, *ib.* 555, may be referred to on the general question as

to mixing goods. But nothing in that case in any way sanctioned the doctrine here advanced. If the warehouseman cannot, from any cause, deliver goods to answer his receipt, he must pay damages therefor to their ascertained value.

The point as to the description of the goods is noticed in *Re Coleman*, 36 U. C. R. 559.

We think the plaintiff should recover. When the receipt was given, we think the parties probably understood that the coal was worth \$6 per ton. 400 tons at this price would just amount to \$2,400, the amount of the plaintiff's two acceptances. Evidence was given at the trial as to the value in the winter, and also that some of the coal was inferior in quality.

On the whole case, we think we are doing justice in directing the verdict to stand at \$2,000, which will represent a value of \$5 per ton, without any allowance for damages in the nature of interest.

*Rule accordingly (a), (b).*

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(a). See also *Lawrie v. Rathbun*, 38 U. C. R. 255.

(b). This case has since been argued in the Court of Appeal, and now stands for judgment there.

## MEMORANDA.

During this term the following gentlemen were called to the Bar :—

PHILIP MCKENZIE, THOMAS HUNTER PURDON, JOHN TOBIAS LENNOX, HEBER ARCHIBALD, WILLIAM BURTON DOHERTY, FRANCIS RYE, ALEXANDER JOHN B. MACDONALD, EMMANUEL THOMAS ESSORY.

# SITTINGS DURING VACATION

## AFTER TRINITY TERM.

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MACKLIN V. KERR ET AL.

*Agreement—Consideration—Agreement not to sue.*

Declaration: that defendants were creditors to over \$4,000 of a firm who had assigned all their estate and effects to one F. in trust for their creditors, and F. as such assignee had sold certain of the goods so assigned to the plaintiff, and been paid therefor a large sum of money, in which defendants as such creditors became interested: that afterwards a certain creditor of the firm's creditors, claiming that the assignment was invalid, took the said goods in execution, whereupon the plaintiff claimed to recover back his purchase money from F., of all of which the defendants had notice: that the plaintiff was indebted to the defendants and would have been unable to pay them, unless he could recover the value of the goods seized either from F. or the persons who took the goods: that defendants thereupon promised the plaintiff that if he would refrain from suing F., and would sue G., the creditor, and D., the bailiff, who took the goods in order to test F.'s title, which they were interested in determining, they, defendants, would indemnify the plaintiff against all costs, &c., which he might sustain in bringing such action, and would, in the event of his failing to recover from G. and D. the value of such goods, repay to him the money which he had paid to F.: that thereupon the plaintiff, relying upon such promise, agreed to and did refrain from suing F., and sued and recovered judgment against G. and D. for the value of said goods, and incurred costs in so doing, but was unable to realize either the said damages or costs, and that defendants had not indemnified him, whereby, &c.

*Held*, declaration good: that it shewed a sufficient consideration for defendants' promise in the plaintiff, at defendant's request, refraining from suing F. and suing G. and D., even if it had not been also alleged, as it was, that defendants had an interest in maintaining F.'s title to the goods.

DECLARATION: For that the defendants, before the making of the promise hereinafter mentioned, were creditors of a certain firm trading under the name and style of Wood & Kirkland, in the sum of \$4,000 and upwards, which said firm had before then made an assignment of all its estate and effects, to the value of \$3,000 and upwards, to one William F. Findlay, in trust for the benefit of their

creditors, including the defendants; and the said William F. Findlay had, as such assignee, sold and delivered to the plaintiff certain goods which were, before and at the time of the execution of the said assignment, the property of the said firm, and which the said William F. Findlay alleged and claimed to have passed to and have become vested in him under the said assignment, for a large sum of money, which was paid by the plaintiff to the said William F. Findlay, and in which the defendants as such creditors thereupon became interested; and the said goods were afterwards, and before the making of the said promise, seized and taken in execution by certain creditors of the said firm, who alleged and contended that the said assignment was inoperative in law and did not pass the said goods or any interest therein to the said William F. Findlay, but that the same were and remained the property of the said firm, and liable to be seized and taken in execution to satisfy the debts of the said firm; and thereafter, and before the making of the said promise, the plaintiff made a claim upon the said William F. Findlay for the repayment of the moneys paid by him for the said goods, as aforesaid, and threatened to sue the said William F. Findlay for the recovery of the moneys, of all which the defendants, before the making of the said promise, had notice. And the plaintiff further says, that at the time of the said promise the defendants were creditors of the plaintiff for a large sum of money, and the affairs of the plaintiff would have been greatly embarrassed, and he would have been unable to pay the defendants the amount of his indebtedness to them, if he failed to recover and collect, either from the said William F. Findlay or the persons who seized and took the said goods, as aforesaid, the value thereof, of which the defendants, before and at the time of the making of the said promise, had notice. And the plaintiff further says, that the defendants thereafter requested the plaintiff to refrain from suing the said William F. Findlay in respect of the matters aforesaid, and to bring and prosecute an action against one William

Garrett, who was the execution creditor of the said firm under whose execution and by whose directions the said goods were seized and taken in execution as aforesaid, and one Thomas Durrant, the bailiff by whom the said goods were seized and taken in execution as aforesaid, for the recovery of the damages sustained by the plaintiff by the seizure and taking in execution of the said goods, and in order to test the validity of the title of the said William F. Findlay to the property assigned by the said firm to him as aforesaid, in the determining of which the defendants were interested, and promised the plaintiff that, if he would refrain from suing the said William F. Findlay in respect of the matters aforesaid, and would bring and prosecute the said action against the said William Garrett and Thomas Durrant, they, the defendants, would indemnify and save harmless the plaintiff of, from and against all loss, damage, costs, charges, and expenses which he should or might pay, bear, suffer, sustain, or be put unto by reason of the bringing and prosecuting of the said action, and would, in the event of the plaintiff failing to recover and receive from the said William Garrett and Thomas Durrant the value of the said goods, repay to the plaintiff the price or sum paid by the plaintiff to the said William F. Findlay therefor; and the plaintiff thereupon, in consideration of the said promise, agreed with the said defendants to bring and prosecute the said action, and to refrain from suing the said William F. Findlay in respect of the matters aforesaid.

And the plaintiff further says, that he did afterwards, and before the commencement of this suit, relying on the said promise of the defendants, and upon the faith thereof, bring and prosecute an action in the Court of Queen's Bench for Ontario against the said William Garrett and Thomas Durrant for the recovery of the value of the said goods so seized and taken in execution by them as aforesaid, and incurred in so doing, and paid costs and expenses to the amount of \$800 and upwards, and refrained from suing, and did not sue, the said William F. Findlay in respect of the matters aforesaid. And the plaintiff further

says, that although, as the fact is, he recovered judgment in the said action for the value of the said goods, he has been unable to realize or collect, and has not realized or collected the damages and costs recovered by him in the said action, or any part thereof. And the plaintiff further says, that the defendants have not indemnified or saved him harmless against the said costs and expenses, or any part thereof; but on the contrary thereof the plaintiff was compelled and obliged to pay, and did pay, the said costs and expenses, amounting to the said sum of \$800, of which the defendants had notice, but failed to pay the same or any part thereof, or to repay the price of the said goods, so paid by the plaintiff to the said William F. Findlay as aforesaid, which amounted to the sum of \$400, or any part thereof; but have wholly neglected and refused, and still neglect and refuse, to pay the same, although often requested so to do.

To this declaration the defendants demurred, on the grounds:—

1. That no consideration is shewn for the defendants' alleged promise in the declaration mentioned.
2. That the declaration on the face of it discloses only an illegal, corrupt, and void contract, opposed to public policy and the due administration of justice.

On August 31st, 1876, the case was argued.

*Edward Martin*, Q. C., for the plaintiff, referred to:—*DeHoghton v. Money*, L. R. 2 Ch. App. 164; *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Elliott v. Richardson*, L. R. 5 C. P. 744; *Earle v. Hopwood*, 9 C. B. N. S. 566; *Carr v. Tannahill*, 30 U. C. R. 217, 31 U. C. R. 201; *Kerr v. Brunton*, 24 U. C. R. 390; *Hill v. Boyle*, L. R. 4 Eq. 260; *Harrington v. Long*, 2 M. & K. 590; *Shackell v. Rosier*, 2 Bing. N. C. 634.

*S. Richards*, Q. C., contra, cited:—*Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Oxford v. Barelli*, 20 W. R. 116, 25 L. T. N. S. 504; *Wynne v. Hughes*, 21 W. R. 628; *Harris v. Venables*, L. R. 7 Ex. 235; *White v. Gardner*,

1 Y. & C. Ex. 385; *Findon v. Parker*, 11 M. & W. 675; *Chitty on Contracts*, 10th ed., 623-4; *Williamson v. Henley*, 6 Bing. 299; 1 Hawk. P. C. 454-8.

September 9th, 1876. GWYNNE, J.—The question simply is, has or not the plaintiff in this declaration stated a sufficient cause of action, assuming the matters therein stated to be true?

It is contended upon the part of the defendant that he has not, for the reason, as is contended, that no consideration sufficient to support the promise, for breach of which the action is brought, is alleged; and 2. for the reason that, as contended, the declaration discloses only an illegal, corrupt, and void contract, opposed to public policy and due administration of justice.

Upon a careful perusal of the declaration, I am of opinion that it is not open to the objections urged, and that it does, uncontradicted, disclose a good cause of action.

Whether the plaintiff had or not in fact a good cause of action against Findlay, the assignee of Wood & Kirkland, entitling him to recover against him the amount claimed by the plaintiff is not a question here. Upon this declaration I must assume that the plaintiff *bonâ fide* believed that he had such a cause of action against him, and, upon this assumption, his agreeing to forbear to sue Findlay, at the request of the defendants, would be sufficient consideration for the undertaking and promise of the defendants to pay the plaintiff the amount of his demand against Findlay, even though it should turn out that the plaintiff could not in law substantiate his claim against Findlay, and although the defendants were utter strangers to, and uninterested in the transaction between the plaintiff and Findlay. But the declaration avers more. It avers that the defendants had an interest in maintaining the validity of the title of Findlay to sell to the plaintiff the goods which he did sell him, an interest in effect to establish that Findlay's sale to the plaintiff was good, and that the act of Garrett and Durrant in taking those goods from the plaintiff was wrongful.

So far as the sufficiency of the declaration is concerned, we are not called upon to enquire whether the defendants had such an interest or not. We can readily understand that they had a very material interest in upholding Findlay's title, and in proving Garrett and Durrant's conduct to be wrongful.

For the present purpose it is sufficient that the declaration avers that the defendants had such an interest.

The case then, as disclosed in the declaration, is simply this, that the plaintiff, believing he had a good cause of action against Findlay, and being about to assert that cause of action by prosecuting Findlay, and the defendants having an interest to maintain Findlay's title, and to establish that the conduct of Garrett and Durrant was wrongful, and it being still a question of law whether the contention of the plaintiff or of the defendants was right, the defendants, in consideration that the plaintiff would forbear suing Findlay altogether, and would prosecute Garrett and Durrant, whom the defendants had an interest in making liable to the plaintiff, promised, that, in the event of the plaintiff not realizing his demand out of Garrett and Durrant, they, the defendants, would pay him the full amount of his claim; and in the event of the plaintiff recovering judgment against Garrett and Durrant, but not being able to realize the amount out of them, the defendants would reimburse the plaintiff all his costs of suit, as well as the amount recovered against Garrett and Durrant.

This, upon the authority of *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449, and of *Harris v. Venables*, L. R. 7 Ex. N. 235, appears to me to disclose a sufficient cause of action.

*Judgment for plaintiff.*

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## TANNER V. SEWERY.

*Nisi prius submission—Award thereunder—Motion to set aside—C. L. P. Act sec. 160, 39 Vic. ch. 28 sec. 5 O.*

Motions to set aside or refer back awards made on nisi prius references under the 160th section of the C. L. P. Act, as contemplated by the 5th sec. of 39 Vic. ch. 28 O., are only such motions as were allowable before the passing of the Act.

Where, therefore, a motion was made to set aside or refer back the award of the arbitrator merely on the ground of the decision arrived at by the arbitrator being against the evidence or weight of evidence, the motion was refused.

On August 30th, 1876, *Lount*, Q. C., moved for a rule *nisi* by way of appeal under the 5th sec. of 39 Vic. ch. 28, Ont., against an award made by an arbitrator, to whom the matters in a cause were referred, by an order of the Judge made at Nisi Prius under the 160th section of the Common Law Procedure Act. The grounds of the motion were stated to be solely because, as was alleged, the decision arrived at by the arbitrator was against the evidence and the weight of evidence.

August 31st, 1876. GWYNNE, J.—No impropriety whatever is imputed or suggested as concerns the conduct of the arbitrator, what is contended being that the 5th section of the above Act entitles the party against whom an award in such a case is made upon all occasions to open the whole question of the merits of the case and the evidence in the shape of an appeal.

Whatever may have been the object of the 4th section of the Act, in requiring the evidence and exhibits taken and produced before the arbitrator to be filed in the office of the Court where the action is pending, I am of opinion that an appeal, as asked, is not given in such a case.

The 1st and 2nd sections of the Act, repealing the 158th section of the Common Law Procedure Act, and substituting another section in its place, expressly provide that an appeal shall lie expressly against the order, decision, report, or certificate made under such substituted section.

By the 10th section, an appeal is also expressly given

in cases of voluntary submissions to arbitration, where it is agreed by the submission that there may be an appeal to one of the Superior Courts, and in such case the reference shall be conducted as directed by the Act, and the appeal shall lie in the same manner as in case of a reference of causes pending in Court—that is, as I read the statute, as is provided by the 1st and 2nd sections. But with reference to an arbitration had under the 160th section of the C. L. P. Act, the language is very different. No new right of moving to set aside or to remit back an award made under that section, for any cause other than those for which such motion might have been made before the Act was passed, is given. All that is enacted is, that in these cases in which a motion may be made to set aside an award or to remit it back, it shall not be obligatory upon the Court to adopt either of such courses, but the Court may—that is, of course, if the matter be such as can be corrected—pronounce and make the award which the arbitrator under the circumstances ought to have pronounced. This is very different from the language appropriate to the giving an appeal, which, if given, must be heard and adjudicated upon by the Court to which it is given.

Now it is well established that no motion to set aside an award or to remit it back can be made or entertained upon the contention that the arbitrator, acting honestly and conscientiously, has arrived at a wrong conclusion as to the merits upon the evidence. I am not in a position, therefore, to receive in this case a motion either to set aside the award or to remit it back upon the suggestion that the arbitrator in making his award has arrived at a wrong judgment upon the merits. Consequently the condition to which the 5th section of the Act refers, has not arisen. If the Legislature contemplated giving an appeal upon the merits in such a case, they have, as it seems to me, very studiously contrived to evade expressing that intention.

*Rule refused.*

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## RUTHERFORD V. EAKINS.

*Declaration—Demurrer—Insolvent Act of 1875, sec. 136.*

A declaration, after declaring on two bills of exchange in separate counts, proceeded to aver that the debt for which the bills were given, was contracted under such circumstances as to render the defendant liable to imprisonment under the 136th section of the Insolvent Act of 1875. To this averment defendant demurred, treating it as a third count, on the ground that it was defective in not alleging certain facts necessary to bring defendant within the provisions of the Act.

*Held*, that this averment was not the subject of either a plea or demurrer.

DECLARATION: For that the plaintiff, &c., alleging that the defendant accepted a certain bill of exchange for \$180, dated 5th November, 1875, drawn upon him by the plaintiff, which is now overdue and unpaid.

2. Alleging the acceptance by defendant, and non-payment of certain other bill of exchange, dated 25th November, 1875, for \$181.81, drawn by the plaintiff.

3. And the plaintiff avers that during the said month of November, 1875, the plaintiff, at the request of the defendant, bargained, sold, and delivered to the defendant goods, consisting of cigars, which amounted to \$361.80, and the plaintiff, at the request of the defendant, gave him time or credit for the payment of the said sum, so thereby becoming his creditor as aforesaid. And the plaintiff avers that at the time the defendant so purchased the said goods and obtained the said credit for the payment of the price thereof, and for which he accepted the said bills in the first and second counts mentioned as aforesaid, he, the defendant, knew he was unable to meet his engagements, and concealed the fact of such inability from the plaintiff, so thereby becoming his creditor as aforesaid, with the intent to defraud the plaintiff as such creditor; and the defendant has not paid the said debt or any part thereof, although the time for payment thereof has long since elapsed. And the plaintiff charges that the defendant, by reason of the premises, was and is guilty of fraud within the 136th section of the Insolvent Act of 1875. And the plaintiff claimed in this action \$500, and at the trial thereof

he will seek to establish the fraud so charged against the said defendant as aforesaid, in pursuance of the Insolvent Act of 1875.

The defendant demurred to the third count, on the grounds:—

1. That the said count does not shew that the defendant is a trader within the meaning of the Insolvent Act of 1875.

2. That the said count does not set forth that it was as a trader the defendant purchased said goods.

3. That it avers certain frauds to be under the 136th section of said Act, which creates no liability against the defendant.

4. That said Act does not provide that every offence punishable under said Act, shall be tried as other offences of the same degree are triable in this Province, and said count seeks to enforce a remedy which can only be obtained by indictment.

5. That it nowhere appears in said count where the offence alleged took place, to shew the jurisdiction of this Court to try the same.

6. That it does appear from said count that the plaintiff accepted certain promissory notes for said alleged indebtedness in payment thereof, and is now procuring his remedy thereon.

October 3rd, 1876. *J. K. Kerr*, Q. C., for the demurrer cited *Robson* on Bankruptcy, 2nd ed., 557–562; *Regina v. Cherry*, 12 Cox C. C. 32; *Regina v. Bell*, 12 Cox C. C. 37; *Bump* on Bankruptcy, 7th ed., 723; *Dredge v. Watson*, 33 U. C. R. 165.

*Osler*, contra, cited *Booth v. Taylor*, L. R. 1 Ex. 51; *Barnes v. Nisbett*, 7 H. & N. 158.

October 10th, 1876. GALT, J.—The declaration in this case, after containing two counts on bills of exchange, proceeds to aver that the debt for which these bills were given was contracted under such circumstances as to render the defendant liable to imprisonment for fraud under the 136th section of the Insolvent Act of 1875.

The defendant demurs to this averment, treating it as a third count, and alleging as causes of objection, that it is defective as not shewing certain facts which may be necessary to bring the defendant within the provisions of the Act.

The case of *Booth v. Taylor*, L. R. 1 Ex. 51, appears to me to be an authority that such an averment is not the subject either of a plea or of a demurrer.

That was the case of a claim for an injunction, and the Court held that a claim for a writ of injunction could not be pleaded to.

Pollock, C. B., says, at p. 53: "My view of the statute is, that the claim for a writ of injunction which is made by the writ and in the declaration, is merely a preliminary formality to enable the plaintiff to ask for an injunction at the proper time; and until he does so ask, no judgment for an injunction can be given; for the successful plaintiff is not entitled to it as a matter of course. This plea is therefore not called for, and must be struck out."

In like manner, by the 136th section it is provided, after stating the liability of a person purchasing goods on credit, knowing himself to be unable to pay, "that in the suit or proceeding taken for the recovery of such debt or debts, the defendant be charged with such fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding."

It appears to me that the effect of this proviso is, that after the defendant has been proved to be liable for the debt, that then the plaintiff may ask that he may be declared to be guilty of fraud under the statute, and declared to be guilty, if it has been shewn that the debt was contracted under such circumstances as render him liable, which would necessarily include the question whether or not he is a person within the provisions of the Insolvent Act.

The judgment will be for the plaintiff on the demurrer.

*Judgment for plaintiff.*

## IN RE MCINTYRE AND THE CORPORATION OF THE TOWNSHIP OF ELDERSLIE.

*Alteration of school sections—By-law authorizing—Appeal to County Council—  
—Debentures—Requirements of—37 Vic. ch. 28, secs. 48, 61.*

A township council in April, 1874, under 37 Vic. ch. 28, sec. 48, passed a by-law altering certain school sections in the township, and on its being petitioned against to the county council, they, in June, 1874, appointed a committee, under sec. 61, to settle the matter. In November, 1874, the committee established the sections, and reported to the county council, which, under sec. 57, would not take effect until the 25th of December following; but in consequence of the report embracing union sections over which the committee had no control it was inoperative. In June, 1875, the township council passed another by-law, repealing their former by-law, and defining the limits of the sections. This also on petition was referred by the county council to committee to settle and report on, which they did in December. Previously, however, to their report being so made, the township council, on the 11th September, 1875, passed the by-law in question, levying a rate for school purposes on the sections as they existed prior to December, 1874.

*Held*, that the by-law was valid, for that until the result of the appeal was reported to the county council the sections as established before December, 1874, continued to exist.

By-laws were passed by a township council granting to the trustees of school sections authority to issue debentures for the erection of a school house, and creating a rate not payable within the year, but without settling an equal special rate in each year, &c., as required by sec. 243 of the Municipal Act of 1873. *Held* invalid.

The by-laws authorized the trustees of the school section, instead of the reeve of the township, to sign the debentures: *Held*, also a fatal objection, notwithstanding that in fact the debentures had been executed by the reeve.

On March 31st, 1876, *Robinson*, Q. C., obtained a rule *nisi* to quash by-laws Nos. 171, 173, and 174, of the corporation of the township of Elderslie, or some one or more of them, wholly or in part.

The objections taken to the said by-laws were as follows:

To by-law 171, that it directed the levies therein mentioned to be made on the several school sections of the said municipality according to the original boundaries of said sections, as they were before the appointment of the committee by the County Council in 1874, and the said by-law was, in this respect, unauthorized and beyond the power of the municipality, the said sections having been duly revised and altered by authority of the said county

council; and because the levy thereby directed in school section one was excessive and not warranted by the facts as recited in said by-law.

To by-law No. 173, that the said by-law did not settle an equal special rate to be levied in each year in addition to all other rates, for paying the debt thereby authorized to be contracted, and the interest thereon; nor recite the annual special rate in the dollar required for paying the interest and creating an equal yearly sinking fund, nor that the said debt was created upon the security only of the special rate created by said by-law: that said by-law authorized the trustees of said school section No. 4, to borrow upon debentures to be executed by them, and not by the corporation of the said township; and that the said by-law directed, and was intended to direct, a levy upon said school section, not as the said section is bounded according to law, the boundaries thereof lawfully settled by the committee of the county council of the county of Bruce, and authorized a levy upon the said applicant and others whose lands were not within the said section as by law established.

The objections to by-law No. 174 were substantially the same as those taken to by-law No. 173.

From the affidavits and papers filed, it appeared that on 13th April, 1874, the township council passed a by-law altering the school sections in the township. Against this alteration, a petition was presented to the county council in June, 1874, who appointed a committee in accordance with the statute, to revise and alter the boundaries of the school section or sections, so far as to settle the matters complained of. This committee reported, and established the school sections in a manner essentially different from that laid down by the said by-law, and embraced union sections over which they had no control, and consequently was inoperative. This was in November, 1874. By the 57th section the alteration was not to take effect until the 25th of December next after the alteration was made. In the month of April, 1875, the township council passed

another by-law, No. 167, repealing the former by-law, and again defining the limits of the different school sections.

Several petitions were presented to the county council at their June session against this by-law, who again appointed a committee, who made their report and award in the early part of December, 1875. Before the council met in December, and before the committee had reported, namely, in September, the township council passed by-law 171, now complained of.

This by-law was passed on the 11th September, 1875, after the report made by the committee in 1874, and in fact treated the limits of school sections as defined by this report as null and void.

The by-law was entitled:

"By-law No. 171, A.D. 1875.

"For the purpose of raising by levy the several sums asked for by the trustees of the school sections of this municipality, hereinafter named, for school purposes." And it then recited that the trustees of school sections 1 (this was the section in which the relator was principally interested), and 2, have made application to the council to raise certain sums of money therein mentioned. It then enacted that these sums should be raised, &c.

By-law No. 173 was passed by the said corporation, on the 13th of December, 1875, and was entitled, "A by-law to grant to the trustees of school section No. 4, of the said corporation, authority to borrow the sum of \$500, for the purpose of erecting a school house in the said section, in the township of Elderslie, and for the levying in each year on the taxable property in the said school section, a sufficient sum for the payment of the interest on the sum borrowed; and a sufficient sum to pay off the principal in four years."

By-law No. 174, was passed by the said corporation on the 13th December, 1875, and was similar to the last named by-law, granting to the trustees of school section No. 2, of the said township, authority to borrow the sum of \$450, for the purpose of erecting a school house in said section.

These were the by-laws now complained of.

On September 15th, 1876, *Osler*, shewed cause.

*Robinson*, Q. C., contra, referred to *Hart and Municipality of Vespra*, 16 U. C. R. 32.

October 17th, 1876, GALT, J.—By the 48th section of “The Public School Law,” 37 Vic. ch. 28, O., “Every township council shall have authority to pass by-laws,” sub-section 10, “to alter the boundaries of a school section, in case it clearly appears that all parties to be affected by the proposed alteration in such boundaries have been duly notified of the proposed alteration by the council, or of any application made to it to do so.” (a) “Any alteration in the boundaries of a school section made at any previous time by a township council, or the neglect or refusal of the council to alter such boundaries at the request of the trustees of the school section concerned, or of the inspector, may be appealed against to the county council, as provided in section 61 of this Act.”

Sec. 61, sub-sec. 9, authorizes the county council to appoint committees to settle appeals against formation or alteration of school sections.

Sub-sec. (a), “The committee thus appointed shall revise and alter the boundaries of the school section or school sections, so far as to settle the matters complained of.”

It appears to me to have been the intention of the Legislature that, until the result of the appeal shall be known, the alteration contemplated shall not take effect, and that the limits of the school sections, as they were established prior to the proposed change, must continue.

In this case, as it appears that the report of the committee in 1874 embraced union sections over which they had no authority, and consequently could not be carried into effect, I think that the township council were justified in considering that the different sections remained as they were prior to December, 1874, and in passing a by-law to raise the money required by the trustees.

This rule, therefore, so far as relates to by-law 171, will be discharged.

As respects by-law 173, entitled a by-law to grant to the trustees of school section No. 4 authority to borrow the sum of \$500, for the purpose of erecting a school-house in said section, and for the levying in each year upon the taxable property in the said school section a sufficient sum for the payment of the interest on the sum borrowed, and a sum sufficient to pay off the principal in four years.

It is objected that the said by-law does not settle an equal special rate to be levied, in each year, in addition to all other rates, for paying the debt thereby authorized to be contracted and the interest thereon, nor recite the amount of the special rate in the dollar required for paying the interest and creating an equal yearly sinking fund, nor that the said debt is created upon the security of the special rate created by said by-law: that the said by-law authorizes the trustees of said school section to borrow upon debentures to be executed by them, and not by the corporation of the said township; and that the said by-law directs and is intended to direct a levy upon said school section, and as the said section is bounded according to the the boundaries thereof lawfully settled by the committee of the county council of the county of Bruce, and authorizes a levy upon the said applicant and others, whose lands are not within the said section as by law established.

By-law 174, which authorizes a loan to section No. 2, is objected to on substantially the same grounds.

Both by-laws are open to all the above objections, with the exception of that which states that the by-law does not state that the debt was created upon the security of the special rate.

There is no special rate in the dollar mentioned, which appears to me to be a fatal objection. This is expressly required by section 248 of the Municipal Act of 1873, subsec. 3, which enacts: "The by-law shall settle an equal special rate per annum, in addition to all other rates, to be levied in each year for paying the debt and interest."

There is also another fatal objection pointed out by the rule, namely, that the by-laws authorize the trustees of the

school section affected to execute the debentures. It is true that it appears that the debentures have been executed by the reeve, but this is not in accordance with the terms of the by-laws.

This rule therefore will be absolute to quash by-laws Nos. 173 and 174, with costs.

As respects by-law 171, as the township council appears to have acted with an entire disregard of what they must have known was the opinion of the committee of the county council, there will be no costs.

*Rule discharged as respects by-law 171, without costs.*

*Rule absolute to quash by-laws 173 and 174, with costs.*

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## IN THE COURT OF APPEAL.

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McKENZIE ET AL. (Plaintiff in the Court below), *Appellants*,  
v. KITTRIDGE ET AL. (Defendants in the Court below),  
*Respondents*.

*Shareholder—Payment of individual stock—Registration of certificate—  
Consol. Stat. C. ch. 63, secs. 33, 35—Court equally divided—Judgment.*

On appeal to the Court of Appeal, DRAPER, C. J. OF APPEAL and PATTERSON, J., were of opinion that the judgment of the Court of Common Pleas—namely, that under Consol. Stat. C. ch. 63, secs. 33 and 35, a shareholder, on paying up his shares and registering a certificate thereof, even though after the expiration of the thirty days mentioned, was exempt from all liability for future as well as existing debts—should be affirmed. BLAKE and PROUDFOOT, V.CC., were of opinion that to create such exemption it was necessary to register the certificate thereof within the thirty days, and that the judgment therefore should be reversed.

The Court being equally divided, the appeal was dismissed with costs.

Appeal from the judgments of the Court of Common Pleas, reported in 24 C. P. pp. 1 and 145.

The following were the appellants' reasons of appeal :

1. That under Consol. Stat. C. ch. 63 stockholders continue liable for all debts and contracts made by the company until the whole amount of the capital stock of the company, fixed and limited as by the said Act is provided, has been paid in; and that to put an end to such liability, a certificate of such payment must, within thirty days after the payment, be made and drawn up, signed and sworn to by a majority of the trustees of the company, including the chairman or president, and registered in the registry office of the district or county wherein the business of the company is carried on.

2. That if the payment in full of his shares by any shareholder can exempt him from liability before the whole capital stock has been paid in, a certificate of such payment made, signed, and sworn to, as already mentioned, must be registered within thirty days after the payment.

3. That the true construction of the said statute is, that such certificate must at all events be registered before the contracting by the company of the debt, for which the shareholder is sought to be held liable: that if registered within thirty days from the payment, such registration relates back to the time of such payment, and exempts from liability from that time; but if registered after the thirty days, it takes effect and forms an exemption only from the time of such registration. In this way secs. 33 and 35 of the said statute may be reconciled and given effect to, and this construction of the Act is in accordance with the opinion of the Court of Queen's Bench in *McKenzie et al. v. Dewan et al.*, not yet reported (a), in which the judgment now appealed from was followed *pro forma*, but dissented from.

4. The object of the statute in requiring registration was, to give notice to those dealing with the company that the shareholders who had paid and registered their certificates were exempt, and thus to prevent credit being given on the faith of their liability; and this intention is defeated, and a door opened to fraud upon the creditors of the company, by exempting shareholders who have neglected to register their certificates of payment.

The following were the respondent's reasons against the appeal:—

1. That under the provisions of Consol. Stat. C. ch. 63, any shareholder, notwithstanding that the whole capital stock of the company has not been paid in, may, within five years from the incorporation of the company, pay up in full his shares in the company, and register a certificate to that effect under the provisions of the said Act, and that there-

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(a) Since reported in 36 U. C. R. 512.

upon he is, by the effect of sec. 33, discharged from all liabilities of the company then existing or thereafter contracted.

2. That it is unnecessary that a certificate under sec. 33 should be registered within thirty days after payment by the shareholder of the last instalment on his shares, and that the effect of sec. 33 is merely to require that the certificate shall be made and registered in the manner, and not within the time, mentioned in sec. 33.

3. That at all events the provisions of sec. 35 as to the period within which the registration of the certificate is to be effected are directory only.

4. That there is no ground for the distinction taken in the Court of Queen's Bench in the case of *McKenzie et al. v. Dewan et al.*, as to the effect of a registration within or after thirty days from the time of payment: that such registration, whenever made, operates to relieve the shareholder from existing debts of the company, and if a registration within thirty days operates to relieve the shareholder from existing liabilities of the company, the same effect must be given to registration after the expiration of thirty days, or a failure to register within thirty days renders the payment and registration nugatory for all purposes, which is clearly not the effect of the statute.

5. That at all events the judgment of the Court appealed from as to the defendant Smith must be sustained, he having registered within thirty days from the last payment on his shares.

6. That the judgment of the Court appealed from is correct for the reasons therein stated: *McKenzie v. Kittridge*, 24 U. C. C. P. 1.

March 20th, 1876, *Robinson*, Q. C., and *Robertson*, Q. C., for the appellants.

*Meredith*, Q. C., for the respondents.

The arguments will fully appear from the arguments in the Court below, and from the reasons for and against the appeal.

September 15th, 1876. PATTERSON, J. (*a*).—The grounds of appeal alleged in this case reduce the question before us to much narrower limits than were occupied by the questions argued in the Court below.

The defendants are members of a joint stock company, incorporated under Consol. Stat. C. ch. 63.

The plaintiffs, having recovered judgment against the company for several debts due in August and September, 1873, seeks to recover the amount from the defendants under the provisions of the statute.

The defence is, that each defendant has paid up his shares of the stock, and has registered a certificate under section 35 of the statute. Some of the certificates are alleged to have been registered in October, 1873, and before this suit; some of them in March, 1874, and after suit. It is not alleged that any of the defendants registered their certificates within thirty days after they paid up their shares, nor that any of them had paid up their shares before the debts in question were contracted, or even before they were due.

The questions presented to us are:—

1. Whether, by paying up his shares and registering a certificate within thirty days, the shareholder is freed from individual liability for debts already contracted, or only for those contracted after the payment.

2. If registration of the certificate frees from liability for existing debts, will that be so if the certificate is not registered until after the thirty days?

The Court of Common Pleas, in the decision now under review, has held that existing as well as future debts are discharged by the registration of the certificate, even though not registered till after the thirty days.

The Court of Queen's Bench has followed that decision, but Mr. Justice Wilson in delivering the judgment of the Court intimated a different opinion as to the true construction of the statute (*b*).

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(*a*) Present — DRAPER, C. J. of Appeal, PATTERSON, J., BLAKE, V. C., and PROUDFOOT, V. C.

(*b*). *McKenzie et al. v. Dewan et al.*, 36 U. C. R. 512.

The statute, Consol. Stat. C. ch. 63, consolidated the statutes 13 & 14 Vic. ch. 28 ; 16 Vic. ch. 172, and some later statutes whose provisions do not bear on the present controversy.

In consolidating these statutes alterations of the original Acts have been made, both in phraseology and arrangement ; and these changes create some apparent confusion, and occasion difficulty in construing the law so as to give effect to all its provisions, and to make them consistent with one another. On this account we shall probably be able more distinctly to apprehend the intention and effect of the various enactments in question, if we consider them as they originally stood, before looking at them as consolidated.

The Act of 13 & 14 Vic. ch. 28, authorized the formation of a company by any five or more persons, who were to sign a statement or declaration in writing, shewing, amongst other things, the amount of capital stock of the company, and the number of shares of which it was to consist. One duplicate of this statement was to be filed in the county registry office, and one with the secretary of the Province.

Section 8 empowered the trustees to make calls as they should deem proper.

Section 11 enacted that all the shareholders should be jointly and severally liable for all debts and contracts made by the company, until the whole amount of the capital, fixed and limited by the registered declaration, should have been paid in, *and a certificate registered as prescribed in the following section, after which no stockholder* should be in any manner whatsoever liable for or charged with the payment of any *debt or demand due by the company*, beyond the amount of his share or shares in the capital so fixed and limited and paid in, save and except as therein after mentioned.

This exceptional liability is not material at present.

Section 11 further provided that, for the greater security of persons dealing with the company, there should be in a

conspicuous part of every building where the company carried on business, and at the head of all business documents of the company, a statement of the name of the company and the amount of its capital stock.

Section 12 enacted that a certificate of the payment of the capital stock should be registered within thirty days after the payment of the last instalment; and that the capital should be paid in, one-half within one year and the other half within two years from the incorporation of the company, *or the corporation should be dissolved..*

Before passing to the statute of 16 Vic. ch. 172, upon which the question of the liability of these defendants more immediately rests, it is necessary to determine, if we can, what is the effect of the statute from which I have quoted.

Under that statute, would the joint and several liability for *existing debts* cease when the whole of the capital was paid up and the certificate was registered? Or, would the liability for existing debts remain, and the exemption apply only to those subsequently incurred? And is there any exemption or limitation of liability in case the certificate is not registered within the thirty days after payment of the last instalment of stock?

It does not appear to me that there is any serious difficulty in construing all the provisions of this statute together.

The provision about the thirty days was supposed to be difficult to give effect to without involving some inconsistency or confusion; and one suggestion was, that that limitation, when taken in connection with sec. 11, might be read as meaning that while the general rule is that the exemption shall date from the registration of the certificate; yet registration, if made within thirty days, shall relate back to the date of the last payment, so as to give effect to the exemption from that date.

It is not necessary, in my view of the statute, to resort to this construction, which, while it cannot be made without calling conjecture to our aid, is in fact opposed to the direct words of sec. 11, which declare that the stockholders

shall be liable until the money is paid *and* the certificate registered, *after which* only the exemption commences.

The thirty days' limitation seems to have been imposed with reference to the provision contained in sec. 12 for dissolving the corporation in the event of the capital stock not being all paid up in two years, and does not seem to have had any reference to the stockholders' liability. As the continued existence of the corporation was made dependent on the payment of the capital within a limited time, it was proper to provide for a public record of the payment. If thirty days after the expiration of two years from the incorporation of the company the certificate was not registered, there would be a *prima facie* presumption that the event had happened on which the corporation ceased. The connection in the same section of the two provisions, viz., that for registration of the certificate when the stock is paid up, and that for the dissolution of the corporation if it is not paid up in time, bears out this view, and there is nothing in the wording of sec. 11 inconsistent with it. The enactment that, in order to free from liability, the stock shall be paid up and a certificate registered *as prescribed* in sec. 12, does not make it necessary to read the prescription as referring to the time of registration, or to anything but the requisites of the certificate itself and the mode of its registration.

To hold that the time was made essential, would leave the liability of the stockholders for ever unlimited, although they had paid up their shares in full, if by any accident the registration should be delayed for a day beyond the thirty—a consequence which I would not assume to have been intended or contemplated. The result of this construction is, that, under this statute, the general liability ceased as soon as the stock was all paid up and the certificate registered, whether it was registered within or not till after the thirty days.

But what was the liability which ceased? Was it as to all the debts, including those already existing, or only as to those incurred after the certificate was registered? The

words are wide enough to include all debts present as well as future.

When we come to the subsequent Act, which enabled each shareholder to pay separately, and to obtain individual exemption from further liability, we may find very strong reasons for feeling that if that individual exemption applied to debts existing before the payment of his money, either that result can scarcely have been intended by the Legislature, or the Legislature must have abandoned the care for the interest of the creditor which is so apparent in the earlier Act.

We are at present, however, considering the earlier Act by itself, and as it would have to be considered if the other had never been passed.

*"After which no stockholder of such company shall be in any manner whatsoever liable for or charged with the payment of any debt or demand due by such company."* Words more distinctly capable of applying to existing as well as to future debts could scarcely be used. At the same time they are capable of being applied only to future debts if the context, or evident object of the Act, required that construction; because, when the earlier part of the clause declares that until the registration of the certificate the stockholders shall be jointly and severally liable for all debts and contracts made by the company, the later clause might without violence be read as enacting that after registration no stockholder should *become* liable or chargeable with any debt by reason of such debt being incurred or becoming due by the company.

The apparent object of the Act seems to me to point to the extension of the exemption to existing debts. Until payment of all the stock, each stockholder, by being liable to the creditors, was guarantor for all the others that they should pay up their shares. The creditors were thus secured in having the whole capital made available. There is nothing to indicate an intention that they should have any greater security. They knew from the law that all the capital had to be paid in in the course of two years.

They were constantly kept informed, by the notice which was in every place of business and at the head of every document issued by the company, of what the amount of the capital was. They traded, not upon the credit of a capital which they supposed to have been paid up in cash, but upon the credit of a capital the amount of which they knew, and which was guaranteed by all the stockholders to be paid in within two years, or earlier, if necessary to have it earlier to meet the company's engagements.

The object of this statute is fully satisfied by holding that the words "debt or demand due," mean what they would ordinarily purport to mean, viz., due at the time of registration or at any time thereafter.

The statute 16 Vic., ch. 172, made three important changes. In place of allowing the trustees to make calls as required, and leaving the limitation as to payment of one half in one year and the other half in two years, section 1 provided that the stock, fixed and limited in the manner provided by the former Act, should and might be paid *within five years* from the incorporation of the company, by such annual instalments and in such proportions as should be mentioned in the statement or declaration in writing required to be filed in the office of the Secretary of the Province. And section 2 introduced the provision on which the liability of the defendants depends: "Provided always and be it enacted, that notwithstanding anything in the said first cited Act contained, it shall be lawful for any shareholder, at any time from and after the said incorporation, and within the said period of five years therefrom, to pay up his full shares in the company, to the effect whereof a certificate shall be made and registered in the manner provided by the said first cited Act, and which, as to such shareholder and his liability in virtue of the said Act, shall have the same force and effect *from the making* thereof, as the *making and registering* of the certificate of the payment of the whole amount of the capital of such company."

It is apparent that if the effect of this second section is

to enable an individual shareholder, by paying up his own shares, to free himself from further liability for debts then existing, the security which the creditor had under the former Act is very materially lessened; as the solvent shareholders will always pay up their shares when pressed for debts of the company, and the creditor has to suffer from the insolvency of the others. The stated capital may turn out to be available to only a small proportion of its nominal amount; and there would seem to be a dangerous facility created for fraudulently promoting companies with a large nominal but little or no real capital.

For reasons like these, I should much prefer to hold that payment by an individual shareholder did not free him from liability for existing debts, but I cannot see my way to that reading of the statute.

I have no doubt that the words "registered in the manner provided by the first cited Act," refer only to the requisites of the certificate and mode of registration, and not to the time of registration.

This conclusion is supported by considerations which seem to me insuperable, as, *e.g.*, the original reference of the thirty days' limitation, as I understand it, to the provision for the dissolution of the corporation, and not to the personal discharge of the stockholder; the limitation being thirty days after the payment of the last instalment of the capital stock of the company; the absence of anything directly indicating that registration within a limited time was regarded as essential to the discharge of the stockholder; and other considerations, some of which I have above attempted to point out.

It is clear, also, that the certificate cannot have "the same force and effect" as under the former Act, unless its operation extends to existing as well as to future debts.

So far, the matter appears plain enough. It is only when we reach the Consolidated Statute that difficulty presents itself.

Section 32 of that statute repeats the provision of 16 Vic. ch. 172, sec. 1, that the capital stock shall be paid in

within five years from the incorporation of the company, by such annual instalments as are mentioned in the statement filed in the office of the Provincial Secretary. And sec. 35 follows the 12th section of 13 & 14 Vic. ch. 28, in requiring that within thirty days after the payment of the last instalment in the capital stock of the company, the certificate shall be prepared and registered; but it drops the penal provision for the dissolution of the corporation in the event of the stock not being paid up within the prescribed time.

Section 33 contains the provision from 16 Vic. ch. 172, sec. 2, under which a shareholder obtains individual exemption from further liability by paying up his stock and registering a certificate; and is followed by sec. 34, enacting that *all* the stockholders are to continue liable until *all* the stock is paid up and the certificate registered, as enacted by the original statute.

If we are to reconcile these inconsistencies, or to find a reason for some of the provisions which are not easily understood as they stand, we must look for assistance outside of this consolidated Act.

The rule of construction given by the Act respecting the Consolidated Statutes of Canada, 22 Vic. ch. 29, sec. 8, is, that these statutes are not to be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the Acts and parts of Acts repealed and for which the Consolidated Statutes are substituted.

We must apply that rule in the present case. It is true that by sec. 9 the provisions of the Consolidated Statute must prevail, if they are not in effect the same as those of the repealed Acts for which they were substituted. But these Acts are not different in effect, except that the failure to pay up the stock no longer entails the dissolution of the company. The difficulty arises, not from difference in effect, but from the obscurity caused by the consolidation which makes it uncertain what the effect is.

I apply a principle which has been frequently acted on,

and which is stated by his lordship the Chief Justice of Appeal in delivering the judgment of this Court, then composed of nine Judges, in *Whelan v. The Queen*, 28 U. C. R. 108, where he says, at p. 117: "We think that we are, in the construction of the Consolidated Statutes, at liberty to refer to the original enactments in order to help us to a right conclusion. \* \* The 8th, 9th, and 10th sections of the Act respecting the Consolidated Statutes of Upper Canada confirm us in our opinion that the original Act may be looked at to ascertain the effect of the consolidation."

Construing the Consolidated Statute by the light of the original Acts, I find no difficulty in holding that sec. 32 must be read as an exception to sec. 34, and that, notwithstanding the general words of sec. 34, one shareholder may by paying up his stock, and registering the certificate, free himself from further liability, both as to existing and future debts of the company, although the other shareholders may not have paid up their stock. And further, that sec. 33, in requiring the certificate to be "made and registered as prescribed in the 35th section of this Act," is equivalent to sec. 2 of 16 Vic. ch. 172, which required the certificate to be "made and registered *in the manner* provided by the said first cited Act"; and that, although the omission of the penal consequence of dissolution deprives the thirty days' limitation of much of the meaning and object it originally possessed, and makes it now a somewhat purposeless enactment, yet no greater effect is given to it with reference to the personal discharge of the shareholder than it possessed before.

There is also the further consideration, which on the question of construction is not without force, that if we regard the Consolidated Statute as a new law, and read it, as in that case we must do, as one original Act, we should have no warrant for changing the words of sec. 35 in order to adapt them to sec. 33 or to any other section, by reading "thirty days after payment of the last instalment of the capital stock of any such company," as meaning thirty days

after payment of the stock of the individual shareholder ; but we should be bound to read and construe them just as they stand in the section.

The questions which I stated must therefore, in my opinion, be answered in favour of the defendants, and the judgment of the Common Pleas affirmed with costs.

BLAKE, V. C.—By section 11 of the original enactment, 13 & 14 Vic. ch. 28, sec. 11, all the stockholders of the company are jointly and severally liable for all debts and contracts of the company, until the whole amount of the capital stock of such company shall have been paid in and a certificate registered as prescribed in section 12, after which there shall be no liability beyond the amount of the shares so paid up

By this clause, therefore, two things were required in order to absolve from liability : first, payment, and second, registration—in order that the public might be aware of the fact of such payment, and that they were dealing on the strength of the company and not of the individuals who formed it.

By section 12, the certificate referred to in section 11 was to be drawn and signed in a manner therein defined, and was to be registered within thirty days after the payment of the last instalment of the capital stock of the company.

By this latter section there was added the clause that this registration must take place in thirty days after the payment of the last instalment of the capital stock ; so that a stockholder, in order that he might be absolved from liability, must see that all the stock was paid : that a certificate was registered shewing such payment ; and that this registration took place within the thirty days from the last payment on the stock.

I take it to be clear that any stockholder desirous of withdrawing himself from the liability which otherwise existed, must shew an exact compliance with the terms of the clauses of the Act which lay down the means whereby this liability is to be limited. If any other rule were in

force, it would virtually end in the Court enacting the law and laying down the terms on which the rights of the creditors are to be determined or modified.

By section 2 of 16 Vic., ch. 172, an additional means of discharging himself of liability was given to the individual stockholder. Any shareholder could, under that clause, within the prescribed five years, pay up his shares in full, "to the effect whereof a certificate shall be made and registered in the manner prescribed by the said first cited Act," (13 & 14 Vic. ch. 28), "and which as to such shareholder and his liability in virtue of the said Act, shall have the same force and effect from the making thereof, as the making and registering of the certificate of the payment of the whole amount of the capital stock of such company." So that the individual stockholder could then pay up within five years in full, and obtain and register a certificate as prescribed by the Act—that is, within thirty days of the payment of the last instalment due by him on his stock—and then his liability was limited, as under the former Act, when the whole stock was paid up, and the certificate shewing such payment was, within thirty days after the payment of the last instalment, registered. In the case of the individual stockholder, as of the body of stockholders, there were the same requisites in order to obtain this benefit of the Act—payment and registration within a limited period.

By the consolidated Act, Consol. Stat. C. ch. 63, sec. 33, the mode of limiting the joint and several liability of the stockholders is thus laid down: Any shareholder may pay up in full, "and a certificate to that effect shall be made and registered as prescribed in the 35th section of this Act, after which such shareholder shall not, except as hereinafter mentioned, be in any manner liable for or charged with the payment of any debt or demand due by the company."

By section 35, the mode prescribed for the making and registering is as follows: "Which certificate shall be signed and sworn to by a majority of the trustees of the

company, including the chairman or president, and shall be registered within the said thirty days in the registry office of the district or county wherein the business of the company is carried on."

Sections 33 and 34 both refer to section 35 as the one which prescribes the registration which is effectually to limit the liability of the stockholder.

It is not unreasonable that there should be the same requirements in both cases. If there was some very obvious incongruity in applying section 35 to section 33 as it is admitted it should be applied to section 34, then the Court might consider how it is possible so to read the Act as to obviate a state of matters which, although apparently laid down by the Act, yet still could hardly be intended by the Legislature. But as I do not feel there is anything unreasonable in saying "we will allow you to limit your liability by paying in full and shewing this to the public by registering in thirty days thereafter, and, if you do not do so, your liability shall continue as heretofore," I do not think we are justified in adding to, deviating from or explaining away, the, to my mind, clear language of the Legislature.

As the defendants have not brought themselves within the rule which absolves them from liability, I am of opinion the appeal should be allowed with costs.

PROUDFOOT, V. C.—By the Act of 1850, (13 & 14 Vic. ch. 28), the liability of individual shareholders was to continue until the whole capital stock was paid up and a certificate thereof registered within thirty days after the payment of the last instalment.

By section 8, the trustees had the power to require payment of the stock at such times and in such instalments as they might deem proper; but this power was controlled by section 12, that one-half the stock was to be paid within one year, and the other half within two years from the incorporation of the company. The penalty for not paying within two years was dissolution. This, how-

ever, had nothing to do with the certificate. If the stock were paid within the proper time, but no certificate registered, the company would still exist. But in that case the liability of the shareholders would continue. If the certificate were not registered within the prescribed time, say for a twelvemonth, I apprehend the liability of the shareholders would continue until the registry; but they would not be liable after that for new engagements of the company.

Many reasons might be specified for the limit of thirty days, such as to fix a period within which the register must be searched by a creditor, and if he found no certificate, he might be assured of the liability of the shareholders, until at least he received notice of the payment. For if he had notice of the payment, I incline to think the registry immaterial. If registered within the thirty days, the certificate would relate back to its date. But, however that may be, and whatever the reason for the limitation, shareholders, under this Act, could by no means discharge themselves from liability, by the simple payment of their own stock, until the whole was paid up and a certificate registered.

To remedy this the Act of 1853, (16 Vic. ch. 172), was passed, which, after extending the period for payment of the stock from two to five years, provided that it should be lawful for any shareholder to pay his stock in full within the five years, to the effect whereof a certificate should be made and registered in the manner provided by the Act of 1850, and which, as to the shareholder, and his liability in virtue of that Act, should have the same force and affect from the making thereof as the making and registering of the certificate of the payment of the whole amount of the capital of such company.

The effect of this, it seems to me, is to place the shareholder, desiring to exempt himself from liability by early payment, in the same position as the entire body of shareholders by punctual payment, under the Act of 1850, viz., that he must register his certificate within thirty days

from his last payment, or continue liable until he did register, or until the certificate of the payment of the entire stock was registered.

In the consolidation of these statutes (C. S. U. C. ch. 63), the order of enactment is inverted. The clause of the Act of 1853 enabling individual shareholders to procure an exemption by payment of their own stock and registering a certificate, is placed first (sec. 33), and then follow the 11th and 12th sections of the Act of 1850 (secs. 34 & 35), making the shareholders liable until all is paid up and a certificate registered. I think, however, the construction is the same, and that sec. 33 must be read as an exception out of sec. 34.

Reading the Consolidated Statute then with all the light to be derived from the original Acts, the 34th section imposes the general liability on the shareholders for all debts and contracts made by the company until a certificate has been made and registered (sec. 35) within thirty days after payment of the last instalment of the stock. But any shareholder may escape this liability (sec. 33) by paying up his stock sooner and registering a certificate as prescribed in the 35th section.

If the thirty days limit is of any value or efficacy in the 35th section, it must have an equal potency in the 33rd; and a shareholder cannot complain of being made responsible for debts and contracts incurred after paying his stock, if he has not pursued the plain prescription of the statute by notifying the fact in the registry within thirty days.

It seems plain, both from the Consolidated Statute and the original Acts, that two certificates were contemplated, one when a shareholder prepaid his stock, another when the whole was paid up. In the Act of 1853 it is more explicitly set forth, and the certificate was to have the same effect from the *making*, though it need not be registered till thirty days after, as the making and registering of the certificate of payment of the whole stock. If payment alone would suffice to relieve from responsibility until the

time for registering the certificate of the whole being paid, what need to provide for a separate certificate? Why register at all?

The registry must have had some meaning, and I apprehend that was to enable persons dealing with the company to know to whom they had to trust for payment.

This is a principle running through this and all similar Acts. The Legislature was relieving these companies from the ordinary liabilities of partnerships, and took care, while doing so, to protect the public from a reckless or improvident use being made of the limit of responsibility.

This object would be frustrated, if shareholders were to be exempted merely by payment. How are creditors to know of this? To say that registering at any time will do, is practically to say that registering is useless. A person about to deal with the company searches the registry; he finds no certificate of the payment in whole or in part; he does find the articles of incorporation specifying the number of shares, the stockholders, the capital stock, and the annual instalments to be paid in, but he does not find that the whole has been paid, or that any shareholder has paid in full; he calculates from these data the value of the company he is dealing with: yet when he brings his action a certificate is placed on the registry shewing that some one or more shareholders, or all, had paid up before his debt was incurred. To permit this to be a bar to the action would be to turn the statute into an engine of fraud.

It is a general rule that Acts which confer exemptions and privileges correlatively trenching on general rights, are strictly construed. Some instances are given in *Maxwell on Statutes*, 264. But I need refer to no better authority, as to how statutes modifying common law liabilities are to be construed, than the language of Draper, C. J., in *Kraemer v. Gless*, 10 C. P. 470, at p. 475, in reference to the Married Woman's Property Act, Consol. Stat. U. C. ch. 73: "Every provision for these purposes is a departure from the common law. And so far as it is necessary to give these provisions full effect, we must hold the common law

is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief and benefit the Act was intended to give." And this canon of construction, so consonant to reason, has been adopted by other Judges. See *Mitchell v. Weir*, 19 Grant 568.

Applying that rule here, the statute enables persons desirous of embarking in certain commercial undertakings, to exempt themselves from the common law liability of partners, by acquiring a corporate existence and complying with certain stipulations prescribed in the Act. These stipulations must be complied with otherwise the original liability remains.

I think the appeal should be allowed, and with costs.

DRAPER, C. J. OF APPEAL, concurred with PATTERSON, J.

The Court being equally divided the judgment of the Court below stood, and the appeal was dismissed with costs.

*Appeal dismissed.*

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CONTOIS (Plaintiff in the Court below), RESPONDENT, v.  
BONFIELD (Defendant in the Court below), AP-  
PELLANT.

*Timber license—Renewal of, subsequent to letters patent—Endorsement of  
Commissioner of Crown Lands on patents—Effect of.*

To an action for taking the plaintiff's timber defendant pleaded, on equitable grounds, that at the time of an application to the Commissioner of Crown lands for patents to certain ungranted lands of the crown, upon which the timber grew, it was agreed between the applicants and the commissioner that the lands should be granted subject to a timber license to the defendant, then in force, and to a renewal of such license, if granted: that on the patents subsequently issuing, granting the lands absolutely to the patentees, the commissioner endorsed thereon and signed a memorandum of such agreement, and on the expiration of the license renewed it: that the timber was cut during such renewal; and that the plaintiff acquired his title from the patentees, with full knowledge of the premises.

*Held*, on appeal, affirming the judgment of the Common Pleas, that such endorsement and the renewal of the license, were unauthorized and invalid, and that the plea shewed no defence.

*Quare*, whether the Crown could have obtained the rescission of the patents, on the ground of improvidence on the part of the Commissioner in endorsing the agreement, instead of inserting it in the instrument.

APPEAL from the judgment of the Court of Common Pleas, reported in 25 C. P. 39, where the pleadings are fully set out.

The following are the appellant's reasons for appeal:—

The appellant submits that the judgment on demurrer appealed from is erroneous and should be reversed and judgment entered for the appellant on the demurrer, for the following reasons amongst others:—

1. The patentees were estopped in Equity from setting up the invalidity of the license and the renewal, because they expressly agreed that they would take and hold the land subject to the rights conferred by the renewal, and the plaintiff bought with the knowledge of such right: *Clark v. Eby*, 11 Grant 98, at p. 101.

2. If the reservation were upon the face of the patent it would have been perfectly good: *Casselman v. Hersey*, 32 U. C. R. 333.

3. It is good, being endorsed upon the patent, and in equity, at all events, from the fact that it appears upon the

back of the instrument: *Perkins v. Dibble*, 10 Ohio 439; *Whitney v. French*, 25 Vermont 665; *Washburn on Real Property*, 3rd ed., vol. ii., p. 60.

4. A Court of Equity would have restrained an action for taking the timber under the authority of the Crown.

5. It was through error or improvidence on the part of the Commissioner of Crown Lands that this reservation was not embodied in the patent, and a Court of Equity would have cancelled the patent in order that a patent containing such a reservation should be issued: *Proctor v Grant*, 9 Grant 26; *Attorney-General v. McNulty*, 11 Grant 281.

6. Since the Administration of Justice Act, where it is no longer necessary to protect any future right, a Court of Law on an equitable plea can determine a right like this without actually repealing the patent. If the matter were had before the Court of Chancery, that Court would not require to repeal the patent, because the year during which the reservation was to continue had elapsed before the beginning of the action: *Brown v. Blackwell*, 35 U. C. R. 239.

7. The case of *Glidstones v. Earl of Sandwich*, 4 M. & G. 1028, was a case at common law upon common law pleadings, and the question was simply as to the common law right created by the grant in question there.

8. The statute was not intended to preclude the Crown from reserving a right to timber. It was intended to determine that in the absence of any reservation or agreement as between the patentee and the licensee, the patentee should be entitled to the timber.

9. A wrong-doer should not be allowed to set up the statute.

10. The patentees having got the land upon the promise to allow the timber to be cut under the license, and the plaintiff having purchased with knowledge of that fact, the repudiation of that promise is a fraud on the part of the plaintiff: *Podmore v. Gunning*, 7 Sim. 644, 661; *Jones v. Statham*, 3 Atk. 390; *Walker v. Walker*, 2 Atk. 99; *Russell v. Jackson*, 10 Hare 204; *Clark v. Eby*, 11 Grant 98, at p. 101.

The conveyance being by Record will make no difference: *Young v. Peachy*, 2 Atk. 246-257.

The following are respondent's reasons against the appeal:

The respondent (who is the plaintiff in the Court whose judgment is appealed from) contends that said judgment is correct, and that said appeal should be dismissed, for the following reasons, amongst others :

1. The patents passed to the grantees all the trees and growing timber thereon, and the alleged agreement (which is not shewn to be other than a verbal one) set out in the plea, is inconsistent with and cannot control the operation of the patents.

2. The endorsement of the Commissioner of Crown Lands on the patents is not the act of the Crown or of the patentees, and can have no effect.

3. Even if the alleged agreement could amount to a reservation of the trees or timber, the patentees and their assigns would have a right thereto as against every one who could not shew title from the Crown: *Casselman v. Hersey*, 32 U. C. R. 323.

4. The lands having ceased to be "ungranted lands of the Crown," the alleged renewed license under which defendant claims was unauthorized and inoperative, and conferred no title on the defendant: Consol. Stat. C. ch. 23, sec. 1.

5. The Commissioner of Crown Lands had no power by license or otherwise to pass to the defendant the right, if any, reserved or acquired by the Crown under the alleged agreement. Such right, in the absence of any Legislative enactment, could be granted only under the great seal.

6. The right of the defendant under the preceding license expired with the year therein mentioned: no right to a renewal of the license is shewn, and the alleged agreement or promise was not made with the defendant, nor was he in any way party or privy thereto: no right or interest in the defendant is shewn, to give him any *locus standi*, in Equity or otherwise, against the patentees, and it is not shewn that he is in any way authorized to set up the right,

if any, of the Crown against the plaintiff: *Lawrence v. Pomeroy*, 9 Grant 474; *Mutchmore v. Davis*, 14 Grant 346.

7. The alleged agreement with the Commissioner of Crown Lands was an attempt to reserve a right to do an illegal and unauthorized act, and to create an interest unwarranted by law, after the lands had ceased to be the property of the Crown.

June 21st, 1876. *Bethune*, Q. C., for the appellant.

*S. Richards*, Q. C., and *J. A. Boyd*, Q. C., for the respondent.

The arguments will fully appear from the arguments in the Court below, and from the reasons for and against the appeal.

The following additional authorities were referred to: *Mulholland v. Merriam*, 19 Grant 290; *Doe dem. Douglas v. Lock*, 4 N. & M. 807, 3 A. & E. 705; *Chitty* on the Prerogative of the Crown, 388-9, 397-8; *Alton Wood's Case*, 1 Coke R. 68; *Lane's Case*, 2 Coke R. 461; *Doe ex dem. Jackson v. Wilkes*, 4 O. S. 142; *Barton v. Muir*, 44 L. J. N. S. P. C. 19, L. R. 6, P. C. 134; *Corporation of Barrie v. Gillies*, 21 C. P. 213; *Beckwith v. McPhelim*, 2 Allen N. B. 501; *Colyear v. Countess of Mulgrave*, 2 Keen 81; *Eastern Archipelago Co. v. The Queen*, 2 E. & B. 856, at p. 870; 31 Vic. ch. 8, sec. 10, O.

September 28th, 1876. *Moss*, J. (a)—This is an appeal from the judgment of the Court of Common Pleas, affirming a decision of Mr. Justice Gwynne, supporting a demurrer to an equitable plea of the defendant.

The action was for the conversion of saw-logs and timber; and the plea in question is set forth in the report of the judgment on the demurrer, in 25 C. P. 39.

I am of opinion that the judgment must be affirmed.

It was contended on behalf of the appellant that the

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(a) *Present*, Draper, C. J. of Appeal, Burton, J., Patterson, J., and Moss, J.

Crown could have obtained a rescission of the patents on the ground of improvidence on the part of the Assistant Commissioner in indorsing the agreement, instead of giving it effect by its insertion in proper form on the face of the instrument. The learned Judge who originally disposed of the case, seems to have been of opinion that such a right could not have been asserted by the Crown.

As at present advised I do not desire to be understood as concurring in this conclusion. The learned Judge was of this opinion, because in his construction of the pleading there is no pretence of the patentees having withheld from the Crown officers any information which it was their duty to impart and the withholding of which caused the letters patent to have been issued improvidently, nor any suggestion of fraud upon their part, or ignorance on the part of the Crown officers of the condition of the lands, or the right of the licensee therein. But it does not appear to me that this would be a necessary ingredient in the case of the Crown. There may be improvidence on the part of the Crown officers without any *suggestio falsi* or *suppressio veri* by the applicant for the patent.

According to the allegations of the plea the patentees applied for a patent subject to the defendant's license, and to any renewal thereof for the period of one year. The patent on its face grants the land absolutely and unconditionally. It may, therefore, be said to grant more than the subject matter of the treaty between the Crown and the patentees. This excess in the grant may be fairly taken to have been the result of an improvident act of the official whose duty it was to draw a proper patent, and we are not prepared to hold that in such a case the Crown cannot in Equity obtain the relief which under analogous circumstances would be awarded to a subject. But we rest our judgment upon the ground that, even if the memorandum endorsed had been embodied in the patent, the appellant would, for all that is alleged, have been without defence to this action. On that supposition the language of the patent would have been that it was subject to the rights, powers, and privileges of the

defendant under the existing license, and that, *if the license should be renewed* for a year from its expiration, the renewal should confer upon the defendant all the rights, powers, and privileges he had under the existing license, and that the patent should be subject to such rights, powers, and privileges.

I have not been able to perceive any principle upon which it can be held that the defendant has shewn himself entitled to the benefit of this so-called condition or agreement, so far as it related to an extension of his rights for a year beyond the expiration of the existing license. For the preservation of his rights under that existing license, it is scarcely necessary to remark, no express compact was necessary, for the statute expressly annexes that term to every patent.

Then as to the rest, putting it on the highest ground for the defendant, it is a stipulation for his benefit contained in an instrument to which he is not a party. In that case the want of privity prevents him suing either at law or in equity. He would seem to fall clearly within the scope of the principle laid down by the Master of the Rolls in *Colyear v. Countess Mulgrave*, 2 Keen 98. But in truth this was not even an absolute stipulation for his advantage. It was purely conditional upon the Crown doing some other act. By its unmistakable import it depended upon the consideration of the Crown, whether or not the patentees should even appear to owe him any duty. It could not be pretended that any interest or right would ever accrue to him, if the Crown simply remained inactive after the patent issued.

It was, however, argued that the case was similar in principle to *Mulholland v. Merriam*, 19 Grant 288, where a person, not a party to an instrument, was allowed to maintain a bill against one of the contracting parties. But in that case, which no doubt was well decided, it was held that upon the construction of the informal instrument, under which the plaintiff claimed, a trust in his favour was constituted. I can find no satisfactory ground upon which

it could be held that a trust would be created in favour of the defendant by this patent, if remodelled. What was the subject matter of the trust? When did it first arise? When did it become perfect? These are questions to which satisfactory answers cannot be given.

It was suggested upon the argument that the difficulty arising from want of privity was met by the commissioner's renewal of the license for the period of a year, and that this should be treated as a *quasi* assignment by the Crown of any rights which could have been enforced against the plaintiff at its instance. The answer offered to this was that the powers of the commissioner are prescribed and regulated by statute; that an agreement for a renewal of a license is something which the law has not empowered him to make, and is indeed not within the contemplation of the statute; and that he can only give a right to cut timber upon ungranted lands, and even that for no longer period than twelve months.

These positions are fully supported by the statute, but Mr. Bethune attempted to avoid the conclusiveness of the answer they seemed to furnish by the argument that in equity these lands should, for the purpose of sustaining the defendant's rights, be treated as ungranted.

I cannot accept this view. If the endorsed memorandum had been included in the patent, it would not have prevented the grant of the lands from being entirely operative. The estate in the lands would have passed, and would have carried the property in the timber. At most there would have been an exception of a right to grant a license to the defendant to cut and remove timber during a year.

As Mr. Richards well observed: suppose the Crown had done nothing at the expiration of the original license, it could not be denied that the land and timber absolutely belonged to the patentees. Under what then did they acquire it, if not under the patent? Or where was the estate in the meantime?

I agree with the argument of the learned counsel for the plaintiff, that even if what is alleged in the plea could be con-

strued as creating an exception out of the grant of the right to cut timber, the benefit of that exception would not pass to the defendant by the simple renewal of the original license by the commissioner.

It is quite clear that on more than one ground such a plea as that in question could not have been sustained prior to the Administration of Justice Act, 1873. That Act does not in my opinion affect his position. We accede to the contention that he cannot now, any more than he could before the Act, defeat the plaintiff's legal right by invoking the equities which may be involved in the facts alleged in or to be inferred by reasonable intendment from his equitable plea. But this may also shew that if through the intervention or assistance of the Crown, any proceedings could have been taken to prevent the injustice which the plaintiff seems to be committing, if the allegations in the plea are true, they remain untouched by a decision in favour of the demurrer. But in the view I have taken, our duty is to dismiss the appeal with costs.

BURTON, J.—I very reluctantly concur in the judgment, not that I have any doubt of its correctness, but because the claim is so inequitable that I was desirous of taking time to consider whether under the law as recently amended, or in some other way, the Attorney-General on behalf of the Crown, could not interfere and prevent the payment to the plaintiff of the proceeds of the timber, the subject of this suit, to which he has no just or equitable title.

If the timber had been reserved in the body of the patent, altogether, or for a certain number of years, this reservation would have been good, and when an officer of the Crown by error or inadvertence omits to make the reservation, and in ignorance of its effect endorses what was in effect intended to be a reservation for a further term of one year, on the back of the patent, I assume that the patent could be reformed on the application of the Attorney-General, according to the actual intention and agreement of the purchasers and the officer

authorized to contract on the part of the Crown ; and it would seem but reasonable that, if the time has expired during which the reservation was to continue, and there is no object therefore in reforming the instrument, that the Crown should be entitled to retain the timber which it was never intended to grant to the plaintiff or those through whom he claims. There was nothing illegal or contrary to public policy in making such a reservation ; the mode only of carrying it out is open technically to objection ; but if on that account the license last issued is void at law, the timber would, according to the spirit and intent of the agreement with the patentees still remain in equity and good conscience the property of the Crown, and it would appear to be a great defect in our system of jurisprudence if the Crown is not in a position to assert its claim to it or its value, and prevent its appropriation by the plaintiff.

Stripped of the fiction of its being a grant from Her Majesty, I can see no good reason why a contract made with a purchaser of part of the public domain from an officer entrusted with the superintendence of such matters, should not come to be dealt with like any other contract ; and I feel much less concern with “ the assumed lowering of the dignity of the Crown by accepting the verbal promise of the subject in derogation of the rights of Her Majesty’s title by record,” than I do in seeing the aid of this Court invoked by that subject to enforce what appears to be a most dishonest claim, and the Court powerless to resist and bound by law to decide in his favor.

Upon this record, I can see no way of assisting the defendant, but I trust that means may be found to prevent the enforcement of the plaintiff’s claim.

DRAPER, C. J. OF APPEAL, and PATTERSON, J., concurred.

*Appeal dismissed with costs.*

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MICHAELMAS TERM, 40 VICTORIA, 1876.

*November 20th to December 8th.*

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*Present :*

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

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GLEASON V. WILLIAMS.

*Temperance Act of 1864—Notice not to supply liquor—Proof of damages—  
Recalling witness.*

In an action under sec. 42 of the Temperance Act of 1864, 27 Vic. ch. 18, by a wife against a tavern keeper for supplying her husband with liquor after service of a “notice in writing signed by her” in accordance with the statute, there was no evidence to shew that she in fact signed the notice served, but merely that she signed a notice a copy of which was served. *Held*, insufficient.

*Held* also, that under the statute no proof of actual damage is necessary to the maintenance of the action.

At the trial the learned Judge having declined to allow a witness twice called in the progress of the suit to be recalled, or to wait for the possible arrival of another witness, the Court refused to review the exercise of his discretion in so doing.

THIS was an action under the statute 27-28 Vic. ch. 18, “The Temperance Act of 1864” (commonly called the Dunkin Act), by a wife against a tavern-keeper for supplying liquor to her husband after notice.

The cause was tried before Moss, J., and a jury, at Hamilton, at the Fall Assizes of 1876.

At the trial a notice was put in, which was subscribed :

“Mary Gleason, <sup>her</sup> +. Witness, Thos. Woodhouse.”  
<sub>mark.</sub>

One *Woodhouse* proved that he saw the plaintiff make her mark thereon.

*Thomas McDonough*, a constable, swore, "I served a copy of that paper \* \* on 10th August, 1875, on J. G. Williams," the defendant, at his hotel \* \* The notice was given to me to serve, and the plaintiff paid me for serving it. I know that she directed the service of the notice."

At the close of the case it was objected by Mr. Osler, for the defendant, that it was not proved that the notice, said to be served on the defendant, was signed by the plaintiff; and that the service of such a notice, so signed, was the statutory groundwork of the action.

The learned Judge upheld the objection, declining to postpone the case till a witness could be obtained from Dundas, or to allow the witness McDonough to be recalled; and he directed a nonsuit.

In this term, November 22nd, 1876, *Robertson*, Q. C., obtained a rule *nisi* to set aside the nonsuit, on the ground that there was sufficient evidence to go to the jury: that McDonough, who could have supplied the evidence, was in Court, but the Judge would not allow him to be recalled, and that the Court ought reasonably to have waited till Woodhouse had been sent for; and on affidavits.

During the same term, November 29th, 1876, *Osler*, Q. C., shewed cause. There was no evidence to shew that the notice served on the defendant was a notice signed by the plaintiff. The service of such a notice is the foundation of the whole action under the statute, and therefore such notice must be strictly proved. Also, the plaintiff should have proved that she sustained actual damage, and that such damage was the result of the defendant's act, namely, the giving of liquor to the husband, and the plaintiff is not entitled, as a matter of course, to recover the penalty under the statute. As to the other objections, the learned Judge exercised a proper discretion in refusing to allow McDonough to be re-called, or to wait until the witness could be obtained from Dundas.

*Robertson*, Q. C., contra. There was sufficient evidence

given of the service of the notice. The notice was in fact signed in duplicate, and one of the originals was served on the defendant, McDonough, the constable, who served the notice, if he had been re-called, was prepared to prove that he was present at the time and saw the notice signed by the plaintiff in duplicate, both of which were delivered to him, and that he then served one of them on the defendant. McDonough, in his evidence previously given, in fact stated that he served a duplicate original, and it was through his afterwards using the word copy that the difficulty arose. The reason the learned Judge gave for refusing to allow him to be re-called was, that no notice to produce had been served, and that it was necessary to have the subscribing witness; but no such notice is necessary, nor was it necessary to call the subscribing witness. Moreover, the service of a copy would have been quite sufficient: *Jory v. Orchard*, 2 B. & P. 39; *Kine v. Beaumont*, 3 B. & B. 288. There was sufficient evidence of damages, as all it is necessary to prove under the statute is the fact of the giving of the liquor, and there is no necessity to prove any actual damage.

December 28th, 1876. HAGARTY, C. J., delivered the judgment of the Court.

Section 42 of the Act 26-27 Vic. ch. 18, enables the wife to "give notice in writing signed by her" to the inn-keeper, that he is not to deliver liquor to the person named.

If liquor be given within twelve months, &c., the person giving the notice may in an action as for personal wrong recover of the person notified any sum not less than \$20 nor more than \$500, as may be assessed by the Court or jury as damages.

Mr. Osler in shewing cause, in addition to the other objection relied upon by him in support of the nonsuit, urged an objection taken at the trial, that as no actual damages were proved the plaintiff could not recover even the minimum of \$20 fixed by the statute.

We fully agree with the view taken by the learned Judge on this point, and that under the statute the proof of actual damage is not necessary to the maintenance of the action.

When the Court and jury have to consider whether any and what damage beyond the statutable minimum should be awarded, it then may become necessary to consider all the circumstances in evidence bearing on the defendant's breach of duty, and the consequences (if any) shewn to result therefrom.

On the evidence before us, we agree in holding that the case failed on the proof of notice. It was not proved that a notice signed by the plaintiff was served on the defendant. There was merely proof that she signed a notice produced in Court, and a man swore he served a copy of that paper.

We think we must decline to review the exercise of the learned Judge's discretion, either in refusing to allow the re-call of a witness, already twice called in the progress of the suit, or to wait for the possible arrival of another witness.

But as the affidavits shew that the necessary proof can be supplied, we make the rule absolute to set aside the nonsuit, and for a new trial on payment of costs.

*Rule absolute.*

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## ANGLEHART V. RATHIER ET AL.

*Distress—Illegal entry—Liability of landlord for bailiff's act.*

An entry by a bailiff under a distress warrant for rent, must be through the ordinary and natural means of ingress to the place where the distress is about to be made.

In this case the plaintiff's and the adjoining house were under one roof, as were also the kitchens in the rear, over which there was a dark loft, which was undivided, and access to which was through a trap door in the ceiling of each kitchen. The bailiff, acting under a distress warrant delivered to him by the landlord, entered the adjoining house, got through the trap door in that house into the loft, and then removing the trap door in the plaintiff's house, descended into the kitchen, and distrained.

*Held*, that the distress was illegal.

*Held* also, that the landlord was liable for the bailiff's act.

DECLARATION—First count: Trespass.

Second count: Trover.

Third count: Trespass to dwelling house.

There were also four other counts, which it is unnecessary to mention, as the learned Judge directed a verdict to be entered on those issues for the defendants.

The cause was tried before Moss, J., and a jury, at Ottawa, at the Fall Assizes of 1876.

It appeared at the trial that the plaintiff was tenant of a house belonging to the defendant, Rathier, in the city of Ottawa, and that some rent, amounting to about \$10, being due, Rathier gave a distress warrant to the other defendant, St. George. There were two dwellings under the same roof, one of which was occupied by the plaintiff, and the other by a person named LaChapelle. There were two kitchens in the rear of these dwellings. There was only one roof over the kitchens, and the loft between the ceilings of the kitchens and the roof was not divided. There was a hole in the ceiling of each kitchen by which access was obtained to the loft. At the time when the seizure was made the plaintiff was not at home, and the front door was locked, no person being in the house. The person who made the seizure was not the defendant St. George, but his son acting for him.

He gave the following account of what he did: "I saw

the plaintiff on 1st of May. She was outside the house. She laughed at me, and said all was fastened. I went into the plaintiff's house through the hole in the ceiling in La Chapelle's kitchen. I then went to the plaintiff's and descended into the house. I took away the things and sold them. I got through into the loft easily. I just put up a chair in Mr. LaChapelle's. It is all in one upstairs. There was nothing to prevent me, after getting up into the loft, from going to the hole to her kitchen."

The plaintiff stated: "There are two kitchens built out under the same roof. There was a hole in the ceiling of each kitchen; the loft above was dark; the hole in the ceiling of my kitchen was covered on the 1st May."

The goods were sold, and the defendant Rathier received the proceeds.

The jury found a verdict for the plaintiff, with \$50 damages.

In this term, November 23rd, 1876, *Beaty*, Q. C., obtained a rule *nisi* to enter a nonsuit pursuant to the leave reserved, &c., on the grounds following:—

1. That the said verdict was against law and evidence, and for misdirection of the learned Judge in directing the jury that there was evidence of trespass against the landlord, and that the proceedings of the defendant St. George, the bailiff, were illegal and irregular in making the distress in question in this cause in the manner disclosed in the evidence.

2. That the said bailiff had a right to enter the house of the plaintiff as he did, through an open or unfastened way or trap from the adjoining building, through which he lawfully and with license passed.

3. That the bailiff having entered and being in the building of the plaintiff, lawfully opened up an inner door or trap, and thereupon made the distress in question.

4. That the damages were excessive.

5. That the verdict against the landlord was contrary to law and evidence.

During the same term, December 4th, 1876, *T. H. Spencer*

shewed cause. The first ground is that the mode of distress was illegal. The law is that every man's house is his castle, and no one has a right to enter it, except by the direct or implied permission of the owner, or by some process of law which gives such right. The distress warrant does not of itself give a right to enter, but merely to take the goods; but the law implies a license to enter where it is done in the usual and ordinary way, that is by the door, if it be found open or unlocked. In one of the cases an entry through an open window was allowed, but that decision has been subsequently doubted, and it is clearly laid down that there would be no power to open the window. Here the entry was not made either through a door or a window, but through a hole covered up at the time, and in no way used as a means of entry: *Nash v. Lucas*, L. R. 2 Q. B. 590; *Brown v. Glenn*, 16 Q. B. 254; *Ryan v. Shilcock*, 7 Ex. 72; *Hancock v. Austin*, 14 C. B. N. S. 634; *Gould v. Bradstock*, 4 Taunt. 562; *Semayne's Case*, 1 Sm. L. C. 7th ed., p. 105, 115. The next point is, that the landlord is liable for his bailiff's act. The cases in which the landlord has been held not to be liable are where the bailiff seizes another man's goods, or makes the seizure off the demised premises, or seizes goods not by law distrainable; but where the bailiff seizes the goods intended to be seized, the landlord is liable for any irregularity committed by the bailiff in making the distress: *Freeman v. Rosher*, 13 Q. B. 780; *Lewis v. Read* 13 M. & W. 834; *Bates v. Pilling*, 6 B. & C. 38; *Barker v. Braham*, 3 Wils. 368; *Jarmain v. Hooper*, 6 M. & G. 827; *Wilson v. Barker*. 4 B. & Ad. 614; *Wilson v. Tumman*, 6 M. & G. 236; *Codrington v. Lloyd*, 8 A. & E. 449; *Gauntlett v. King*, 3 C. B. N. S. 59; *Mooney v. Maughan*, 25 C. P. 244. As to the damages, the plaintiff proved damages to over \$80. They were, however, left to the jury, and they have found \$50, and the Court, under the circumstances, should not interfere: *Smith v. Ashforth*, 29 L. J. N. S. Ex. 259; *Attack v. Bramwell*, 3 B. & S. 520.

*Beaty*, Q. C., contra. The evidence shews that the bailiff was lawfully on the adjoining premises, and from thence

entered on the plaintiff's without any obstruction, and being lawfully on the plaintiff's premises, he could even have broken open the door of any room in which the goods might be, and clearly could make the entry he did. In *Gould v. Bradstock*, 4 Taunt. 562, where the landlord occupied premises over the tenant, he was allowed to take up the boards of the floor and so enter; and in *Eldridge v. Stacey*, 15 C. B. N. S. 458, where the front door was locked, the bailiff was allowed to get over the fence in the rear and thence through the back door, which he found open. Here the trap door was not fastened, and was intended as a means of ingress and egress, and not for the purpose of merely admitting light or air, and this case therefore is distinguishable from the cases relied upon by the plaintiff: *Nash v. Lucas*, L. R. 2 Q. B. 590; *Hutchinson v. Birch*, 4 Taunt, 619; *Cleland v. Robinson*, 11 C. P. 416. Assuming, however, the distress to be illegal, no liability can attach to the landlord. In none of the cases has the landlord been held liable, unless he be proved to have instructed or authorized the bailiff to commit the trespass, or, after acquiring knowledge of it, to have ratified it. Here, however, there is no pretence that the landlord was ever aware of the bailiff's act: *Freeman v. Rosher*, 13 Q. B. 780; *Lewis v. Read*, 13 M. & W. 834; *Haseler v. Lemoyne*, 5 C. B. N. S. 530. As to the damages, the objection is not pressed.

December 28th, 1876. GALT, J., delivered the judgment of the Court.

There are two questions to be decided in this case: 1. Is the defendant St. George liable in consequence of the manner in which the entry was made. And 2. Is the defendant Rathier responsible for the acts of his bailiff, if we hold that the latter is liable.

No question was made at the trial, nor is any now before us on this rule arising from the fact that the entry and seizure were made by St. George's son.

In *Nash v. Lucas*, L. R. 2 Q. B. 590, the whole law is discussed, and the cases bearing on the first question reviewed.

Cockburn, C. J., in giving judgment, says, at p. 594: "The Court of Exchequer have held that he might open a door which was closed but not fastened; and if a man leaves his door unfastened there may be an implied license to any one who has business to enter the premises. But that must stand on its own ground; the principle will not apply to a closed but unfastened window. Again, it has been said that you may go in at an open window to make a distress; but it is no where said that you may open a window for the purpose. \* \* Therefore the authorities are limited in application either to the case where the door is shut, but can be opened without violence, or where the window is open, and can be entered without doing any violence. But if the window be shut, you are doing violence if you open it, when neither directly nor impliedly is the entry made by the license of the owner of the house."

Mellor, J., concurred.

The present case is very much stronger against these defendants. The entry was made neither through a door nor a window, but through a hole, which, according to the evidence of the plaintiff, was covered up at the time, and which was not at any time intended to afford access to the house—it was the means of communicating from one part of the house to another.

In *Gould v. Bradstock*, 4 Taunt. 562, it was held that trespass would not lie against a landlord, who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, for taking up the floor of his own apartment and entering through the aperture to distrain for rent—on the ground, as stated by Mansfield, C. J., that the defendant removed the floor of his room, which floor was his, and consequently that he was not guilty of trespass, and that when he got into the house without trespass he might lawfully distrain.

It is evident, however, from the language of the Chief Justice, that he had some hesitation in arriving at that decision, for he says, at p. 563: "What is decided in this case will not do much harm or good as a precedent, for probably

the circumstances never happened before, and will never happen again." And considering the law to be as stated in *Nash v. Lucas*, it is very doubtful if the precedent would now be followed in a similar case. But here the circumstances are entirely different as respects the ownership of the floor. The floor at the time when the bailiff entered was the floor of the plaintiff, and consequently he had no right to remove any portion of it, and was guilty of a trespass in so doing.

We are therefore of opinion that he was not justified in entering the plaintiff's house in the manner he did, and the subsequent seizure was illegal.

As far as the opinion of this Court is concerned, we all think that the only safe and intelligible rule should be, that it should be only through the ordinary and natural means of ingress that the bailiff should enter to make a distress.

We presume that one, at least, of the objects of such a rule must be to prevent a breach of the peace. An entry, like that before us, through an ordinarily closed hole in a ceiling, would seem specially objectionable on that score.

The second question remains to be considered, namely, is the defendant Rathier responsible for the act of his bailiff, admitting that he was not aware of the manner in which the bailiff had acted.

*Haseler v. Lemoyne*, 5 C. B. N. S. 530, was a case in which the defendant Lemoyne had not originally granted the warrant to distrain, but she subsequently ratified it. The irregularities complained of were, that the broker making the distress omitted to give the plaintiff notice of the distress, and also omitted to employ another appraiser to value the goods. The plaintiff's attorney wrote to her complaining of these irregularities. She thereupon sent for her agent who had issued the warrant, and upon being informed by him that the goods had been distrained and that they were about to be sold, she said she would leave the matter in his hands. The goods were sold.

On the part of the defendant, Lemoyne, it was submitted that she was not responsible for the irregularities com-

mitted by the broker, even if the warrant had been signed by her authority.

It was held that there was a complete recognition by her of every thing that was done by her agent, who had issued the warrant.—(Here the warrant was given by Rathier.)

And Cockburn, C. J., in giving judgment, says, at p. 534: "I am of opinion that there ought to be no rule in this case. From the evidence of Alexander," (the agent), "it appears, that, after the distress had been made, and the fact communicated to Miss Lemoyne, she said she would leave the matter in his (Alexander's) hands. From that moment the distress was authorized by her, and she became liable for all that was done under her authority. As to whether a landlord is liable for irregularities committed by the broker in conducting the distress, for the reasons I threw out in the course of the argument, I am clearly of opinion that he is liable."

Williams, J., says, at p. 535: "It is quite consistent with the view we take, that the landlord is not liable for the acts of the bailiff in distraining upon premises other than the demised premises, or for seizing things not by law distrainable. But where, as here, he takes the goods which it was meant he should take, the landlord is liable for any irregularity committed by him in the conduct of the distress."

All the cases bearing on this subject, are commented on in the argument in this case.

As to the amount of damages, it was a question for the jury, and we certainly cannot interfere, when the whole amount is only \$50.

*Rule discharged.*

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THE CORPORATION OF THE COUNTY OF ONTARIO V.  
PAXTON ET AL.

*Municipal corporations—Provisional corporations—Treasurer of—Subsequent appointment as treasurer of new county—Liability of sureties.*

The 12 Vic. ch. 78, which provided for the separation of a junior county from a union of counties, also provided for the formation of provisional councils in the junior county until the separation should be perfected, and empowered the provisional council to raise moneys for certain limited purposes, namely, the erection of a court house and jail, and to appoint a provisional treasurer whose duties were limited to the levying, collecting, and paying over such moneys. By 13 & 14 Vic. ch. 24, it was provided that on the dissolution being perfected, and the new county formed, all the provisional officers were to continue the officers of the new county until their successors were appointed, and all the by-laws were to remain in force until altered, amended, or repealed. Under the first-named Act, the provisional corporation passed a by-law appointing one P. treasurer, and defendants became his sureties for the faithful execution of his office. On the formation of the new county, a by-law was passed repealing the by-law of the provisional corporation under which P. had been appointed treasurer; and they thereafter appointed him treasurer of the new county.

*Held*, that defendants were not liable for P.'s acts as treasurer under such last-named appointment.

*Quære*, whether, if the by-law had not been repealed, and P. had continued treasurer of the new county, defendant's would have been liable.

DECLARATION:—For that the defendants by their bond, dated the 8th September, 1852, became held and firmly, bound unto the provisional municipal council of the county of Ontario in the penal sum of £12,000 of lawful money of Canada, to be paid by the said provisional municipal council and their successors, subject to a condition thereunder written, that if one William Paxton, the younger, who had then lately been appointed by the said provisional municipal council of the county of Ontario to be treasurer thereof, should faithfully execute the duties of his said office, and should strictly account for and pay over all moneys which should come into his hands by virtue of his said office, and should render a just and true account thereof unto the said provisional municipal council and their successors when and as often as they should appoint and direct, and should receive and safely keep all moneys belonging to the said county of Ontario, and pay out the same to such persons and in such manner as he should be

directed to do by any lawful order of the said provisional municipal council or by-law in force or to be in force in Upper Canada, and should strictly conform to and obey any such law, or any by-law lawfully made by such provisional municipal council or their successors, and should faithfully and truly perform all such duties as might be assigned to him by any such law or by-law, then the said bond should be void. The count then alleged that after the execution of the bond the said county of Ontario was set apart as a distinct county according to law, and became and was a distinct county as the county of Ontario, and it averred that the said provisional municipal council became and was thenceforth the municipal council or corporation of the county of Ontario, and that the said bond became and was payable to the said municipal council of the county of Ontario. The count then further averred that afterwards the said William Paxton, the younger, while treasurer of the said county of Ontario, and while the said bond was in full force, received divers sums of money as such treasurer as aforesaid and by virtue of his said office, which he failed to pay over to the plaintiffs, whereby the plaintiffs lost the same, and incurred costs in recovering judgment against the said William Paxton, the younger. And for a second breach the plaintiffs alleged that the said William Paxton, the younger, was lawfully ordered and directed by the plaintiffs to deposit in some chartered bank of the Province of Ontario whatever sums of money he should receive as such treasurer as aforesaid, and although he received divers sums of money in virtue of his said office, he neglected to deposit the same in any of the chartered banks of the Province of Ontario whereby the plaintiffs lost large sums of money, &c.

To this count the defendant James Dryden pleaded in bar, setting out at large the bond, and its condition, which in substance and effect was as stated in the declaration. The plea then averred that before the making of the bond the said William Paxton, the younger, by a by-law in that behalf duly made and passed by the said provisional muni-

cipal council of the county of Ontario was appointed treasurer of the said provisional municipal council, and that he continued to be such treasurer of the said provisional council until the said county of Ontario was set apart as a distinct county; and that the said county of Ontario being set apart as a distinct county according to law as the county of Ontario, the said provisional municipal council ceased to exist; and the said municipal council of the said county of Ontario thereupon passed a by-law repealing, and they did thereby repeal, the said by-law of the said provisional municipal council by which the said William Paxton, the younger, had been so appointed as treasurer of the said provisional municipal council, and the said William Paxton, the younger, was thereafter appointed by the municipal council of the said county of Ontario to be treasurer of the said county of Ontario. The plea then averred that the alleged breaches were committed after the said William Paxton, the younger, had been appointed treasurer of the said county of Ontario by the said last mentioned by-law, and not otherwise.

To this plea the plaintiffs demurred, on the ground that the bond so given to the provisional council passed by operation of law to, and enured to the benefit of the county of Ontario, upon its complete establishment as a distinct county.

The defendant also took exception to the declaration, on the ground that the said count disclosed no cause of action against the defendant.

There was a similar plea by the defendant Paxton, which was demurred to on the same grounds as above, and the like exceptions to the declaration were also taken.

During this term, November 28th, 1876, the demurrer was argued.

*Robinson*, Q. C., for the plaintiff. The bond given to the provisional council passed to and became vested in the council on its permanent establishment, and therefore they are now entitled to recover for the default of the treasurer.

By the 12th sec. of 13 & 14 Vic. ch. 64, which governs this case, on the separation of the junior from the senior county, all the officers of the provisional council were to continue the officers of the junior county until their successors were appointed, and all by-laws of the provisional corporation were to remain in force until repealed by some by-law of the junior county. The provisional corporation became merged in the new corporation, but it was the same corporation, and the treasurer continued to, and never ceased to be treasurer, whether of the provisional or permanent corporation. Under sec. 13, the new corporation was to be liable for all the debts of the provisional corporation, and therefore they should certainly have all the assets. The fact of the new by-law having been passed cannot alter defendant's liability: *Thompson v. McLean*, 17 U. C. R. 495; *London, Brighton, &c., R. W. Co. v. Goodwin*, 3 Ex. 320; *Eastern Union R. W. Co. v. Cochrane*, 9 Ex. 197; *Angell & Ames on Corporations*, 10th ed., p. 344, sec. 322; *Polak v. Everett*, L. R. 1 Q. B. D. 699.

*Osler contra.* The Act applicable to provisional corporations, and under which the treasurer was appointed, was 12 Vic. ch. 78. Under that Act the only power conferred on the provisional corporation was for the erection of a court house and jail, and for levying the necessary moneys therefor; and by the 12th section, which empowered the corporation to appoint a provisional treasurer, his duties were limited to the levying, collecting, and paying over of such moneys only as were necessary for the erection of such court house, jail, &c. The sureties' liability therefore only extended to the paying over and accounting for such moneys. It certainly would not be intended that the sureties were to be liable for the duties required in a regularly formed county, which were very different and much more onerous than those in a provisional county. Even if under 13 & 14 Vic. ch. 64, sec. 12, he remained the treasurer of the new county until his successor was appointed, the corporation of the new county, by passing the by-law appointing him their treasurer, put an end to his former

appointment, and the liability of his sureties accordingly ceased: *Lord Arlington v. Merricke*, 2 Wm. Saund., ed. 1871, p. 813, 825; *Rees v. Berrington*, 2 W. & T. L. C., 4th ed. 974, 992; *Leadley v. Evans*, 9 Moore 102; *Mayor, &c., of Dartmouth v. Silly*, 7 E. & B. 97; *Oswald v. Mayor, &c., of Berwick*, 5 H. L. Ca. 857, 866, 872; *Corporation of Beverley v. Barlow*, 10 C. P. 178.

*J. G. Robinson*, for defendant Paxton, relied upon the same grounds as above.

December 28th, 1876. GWYNNE, J., delivered the judgment of the Court.

The Act, 12 Vic. ch. 78, which provided for the dissolution of unions of counties, in its 10th section provided that, in certain cases, the town reeves of the several townships, villages, and towns in the junior county, should constitute a provisional municipal council for such junior county, *until* the dissolution of such union of counties as provided for by the Act.

The 11th section enacted that "every provisional municipal council shall have all the powers in, over, and with respect to such junior county as are by law, or as hereafter may by law be, vested in the different municipal councils in Upper Canada, *so far as the same shall or may be requisite* for the purchase or procuring of the necessary property on which to erect a court house or gaol, for the erection of such court house and gaol, and for raising, levying, and collecting the necessary moneys to defray the expenses of the same, and for remunerating the provisional officers employed or to be employed in or about the same."

By the 12th section, every such provisional municipal council was empowered in their discretion "to appoint a provisional warden, a provisional treasurer, and such other provisional officers for such county as they may deem necessary for the purchase or procuring of such property—the erection of such court house and gaol—the safe keeping of such moneys, and the protection and preservation of such property when thus acquired; which provisional warden, treasurer and other provisional officers shall hold their

offices during the pleasure of such provisional municipal council."

The 13th section declared that every such provisional municipal council should be a body corporate by the name of the provisional municipal council of the county of — and as such, should have all corporate powers necessary for the purpose of carrying into effect the object of their erection into such provisional municipal council as in the Act provided, and none other.

By the 18th section it was provided that as soon as certain appointments should be made, as mentioned in the 17th section, it should be lawful for the Governor in Council, by proclamation under the great seal, to declare the junior county disunited from the union, upon, from, and after the first day of January, which should occur next after three calendar months after the teste of such proclamation, and that such junior county should, upon, from, and after such first day of January, to be so named in the said proclamation, be, to all intents and purposes whatsoever, disunited from such union, and that thereupon the said provisional municipal council should, upon, from, and after such day lapse and be absolutely dissolved.

Then 12 Vic. ch. 81, sec. 171 enacted that it should be the duty of the municipal corporation of the several counties, &c., to appoint a treasurer, who should hold office during their pleasure, and who should give such security for the faithful performance of the duties of his office, and more especially for the due accounting for and paying over all moneys which should come into his hands by virtue of his office as the municipal corporation by which he was appointed should direct.

The 172nd section declared it to be the duty of such treasurer to receive and safely keep all moneys belonging to the county, &c., for which he should be appointed, and to pay out the same to such persons and in such manner as he should be directed to do by any lawful order of the municipal corporation.

And by section 173 it was provided that the treasurer,

&c., so to be appointed by such municipal corporation, should hold office until removed therefrom by the municipal corporation for the time being, notwithstanding any change in the persons of whom such municipal corporation should be composed, occasioned by any new election or appointment.

Then the 12th section of 13 & 14 Vic., ch. 64, enacted: That upon, from and after the day on which the union between any two or more counties theretofore forming a union of counties should be dissolved, the town reeves and deputy town reeves of the junior county of such union, who should be in office on the day preceding the dissolution of such union, should, until replaced by new elections, form and be to all intents and purposes whatsoever the municipal council of such junior county, which municipal council, and their successors, should, to all intents and purposes whatsoever, be substituted for the provisional municipal council of such county which shall have been thereby dissolved, and that the provisional warden and other provisional officers of the said provisional municipal council should be and continue the warden and officers respectively of such junior county, until the election and appointment of their successors; and that all the by-laws of such provisional municipal council should be and continue in force until amended, altered, or repealed by some by-law or by-laws to be passed for that purpose by the municipal council of such junior county.

The question before us is one simply of construction of the contract of surety. Did the sureties thereby contract to be responsible for William Paxton, the younger's, dealings and transactions with the funds of the County of Ontario after it should be established in due form of law a separate county, in case he should be appointed or continue to be treasurer of such county? But, although a question only of construction, there are a few cases bearing upon the point to which it may be desirable to refer.

*The Mayor, &c., of Berwick v. Oswald*, 1 E. & B. 295, was an action against the sureties of the treasurer of the Borough of Berwick-upon-Tweed.

By the Imperial Act, 5 & 6 Wm. IV., ch. 76, sec. 58, it was enacted that the council of every borough should, in every year, appoint a fit person, not being a member of the council, to be the treasurer of the borough, and that they should take such security for the due execution by him of his office as they should think proper.

This was the Act in force when one Murray was appointed treasurer of the borough for the year ending the 9th of November, 1842. The deed sued upon was executed on the 15th January, 1843, and thereby the defendant Oswald and others, after reciting that Murray had been appointed treasurer for the remainder of the year ending 9th November, 1843, and that he was required to find security or caution for the payment of all such sums of money as Murray should receive in consequence of his said appointment as treasurer aforesaid. And the undertaking of the sureties was by the deed stated to be, that the said Murray should and would well and truly pay unto the mayor, aldermen, and burgesses of Berwick, or to their successors in office, all such sums of money, &c., as the said Murray should recover or receive in virtue of his said appointment as treasurer as aforesaid during the whole time of his continuing in the said office, in consequence of the said election, *or under any annual or other future election of the said council to the said office.* Murray was re-elected in November, 1842, treasurer for the year ending in November, 1843. On the 24th August 1843, the statute 6 & 7 Vic. ch. 89 was passed, whereby the section of 5 & 6 Wm. IV., ch. 76, providing for the annual election of treasurer, was repealed, and it was enacted that the council of every borough should, on the 9th day of November then next, appoint a fit person, not being a member of the council, to be treasurer of the borough, who should thenceforth hold his office during the pleasure of the council for the time being. On the 9th November, 1843, the council re-appointed Murray as treasurer, under this Act, and the question was, whether the sureties were responsible for his defaults as treasurer while acting under such subsequent appointment.

Lord Campbell, in giving judgment, says, at p. 307:—"It is quite clear that, according to *Lord Arlington v. Merricke*, 2 Saund. 403, and many subsequent cases, the liability of the sureties of David Murray would have ceased on the 9th day of November, 1842, however long he might have continued in the office of treasurer, if to the words, 'during the whole time of my continuance in the said office in consequence of the said election,' there had not been added the words, 'or under any *annual or other* future election.'" And it was held that, under these words, the sureties were liable.

This judgment was affirmed in appeal by the majority of the Court of Exchequer Chamber, Jervis, C. J., Pollock, C. B., and Maule, J., dissenting, 3 E. & B. 653.

Martin, B., there says, at p. 660:—"The office, however, remained the same, with all its duties and emoluments unaltered; and the only alteration made was that, instead of being an annual office, it became one from which *Murray* was removable at the pleasure of the council. I fully agree," he says, "that if any additional or increased risk would have been thereby cast upon the defendant, the surety, his liability would have been determined."

The question there, it will be observed, was precisely as here: Was the re-election of the treasurer in November, 1843, within the meaning of the condition of the bond?

In *Kitson v. Julian*, 4 E & B. 854, a similar point arose. The officer for whom the security by bond was given there, was clerk, superintendent, and inspector of the Torquay Gas Company. The plaintiffs sued upon the obligation in the bond.

The plea set out the condition thereof, whereby it appeared that the clerk, one Julian, should and would, from time to time and at all times so long as he should continue to hold the said office or employment—his appointment to which was recited—faithfully and punctually account for and pay over to the plaintiff as a trustee for the gas company, all and every sums of money which should be received by him, the said Julian, by virtue or in execution

of his said office or employment. The plea then averred that the appointment of Julian to the office and employment in the condition mentioned was an appointment of him to the said office and employment *for one year* from lady day in the year 1850, and no longer. And that Julian had fully accounted for all moneys, &c., according to the true intent and meaning of the said condition.

To this plea the plaintiff replied, that Julian by and with the assent of the sureties, and of the gas company, continued in the said office after the expiration of the year in the plea mentioned, for a long period of time, and during such last mentioned period failed to account for moneys received under and by virtue of and in execution of his said office during such period.

The question arose upon a demurrer to this replication.

In giving judgment in favour of the sureties, Lord Campbell says, at p. 858 :—"The liability continues after the expiration of the year, if that was the intention of the parties. \* \* Many decisions shew that, when the principal is made liable for a given time only, the liability of the surety is confined to that time. We have here a positive averment that the appointment was for one year, and no more. The condition recites the appointment, the extent of which is shewn by the plea; and we must assume that it was known to both parties what that extent was."

And Wightman, J., says, at p. 859 :—"If here the condition had recited that the appointment was for a year only, that, according to the authorities, would have had the effect of so restraining the obligation. But the fact is supplied by the plea, which makes the case the same."

The *Mayor of Dartmouth v. Silly*, 7 E. & B. 97, raised a point similar to that in *Mayor of Berwick v. Oswald*.

In that case the bond recited that one Pentecost had been appointed by the council of the borough of Dartmouth to be treasurer thereof under 5 & 6 Wm. IV. ch. 76, and the condition was, that he should, from time to time and at all

times thereafter, duly and faithfully account for, apply, and pay all sums of money, &c., which should come to his hands or under his control as treasurer of the borough aforesaid, *whether by virtue of his present or any subsequent appointment to the said office.*

The question was whether this obligation continued in force as security for Pentecost, who was reappointed treasurer under 6 & 7 Vic. ch. 89, in respect of his transactions as treasurer under such last mentioned appointment; and it was held that the condition of the bond covered such last mentioned period, Lord Campbell delivering the judgment of the Court, declaring that the condition contained language more potent for the purpose of holding the sureties to be responsible, than any to be found in the instrument adjudicated upon in the *Mayor of Berwick v. Oswald*.

In *London Brighton, &c., R. W. Co. v. Goodwin*, 3 Ex. 320, the clerk for whom the security was given was employed by three companies, and the bond was given to one of them as security for moneys received by him on account of all three companies.

In the *Eastern Union R. W. Co. v. Cochrane*, 9 Ex. 197, the question was, whether a bond executed by the defendant as surety for the faithful service of a clerk in the employ of the Eastern Union Railway Company, extended to cover the acts of the clerk after the Western Union Railway Company had by a subsequent Act of Parliament, 10 & 11 Vic. ch. 174, been incorporated with another company, namely, the Ipswich and Bury St. Edmunds Company; and it was held that it did, by reason of the terms of 10 & 11 Vic. ch. 174, the 10th section of which provided, among other things, that "all conveyances, contracts, agreements, mortgages, bonds, covenants, and securities, made or entered into before" the amalgamation of the companies, "to, with, in favour of, or by or for the dissolved companies, or either of them, or any person duly authorized on their behalf, should, immediately after" such amalgamation, "be and remain as good,

valid, and effectual" in favour of, and against, and with reference to the new company" to which was given the corporate name of the Eastern Union Railway Company, "in the same manner to all intents and purposes as if the last mentioned company"—that is, the newly incorporated company—"had been a party to and executed the same, or had been named or referred to therein, instead of the persons, company, or party actually named therein, respectively."

And the 14th section enacted that every clerk, &c., who, at or immediately before the amalgamation, was in the service of either of the dissolved companies, should immediately after the amalgamation hold his office and employment, together with the salary and emoluments thereto annexed until he should be removed by the new company, and that every such clerk, &c., should have the like powers and authorities, and should be subject and liable to the like pains and penalties, and to the like power of removal, and to the like rules and regulations in all respects whatsoever, as if he had been appointed by the newly incorporated company.

It was held that the words of the 10th section were used for the express purpose of continuing the liability of parties to such bonds as that set out, the Court saying that if the Legislature meant to continue the liability, what other language could they have used so as to leave so little doubt as the present?

Now, in the case before us, the plea avers the appointment of William Paxton, the younger, by a by-law duly passed by the *provisional* municipal council of the County of Ontario to be treasurer of the said provisional municipal council; and the condition of the bond before us, after reciting such appointment, is that, if he should faithfully execute the duties of *of his said office*, and should strictly account for and pay over all money which should come into his hands by virtue of his said office, and should render a just and true account thereof unto the said *provisional* council and their successors, when and as often as they

should appoint and direct, and should receive and keep all moneys belonging to the said county of Ontario, and pay out the same to such persons and in such manner as he should be directed to do by any lawful order of the said provisional municipal council, or by law in force in Upper Canada, and should strictly conform to and obey such law or any by-law lawfully made by such provisional municipal council or their successors, and should faithfully and truly perform all such duties as may be assigned to him by any such law or by-law, then the obligation to be void.

The 11th section of 12 Vic. ch. 78, confines the powers of provisional municipal councils of raising money to a very limited purpose, and in accordance therewith the 12th section necessarily limits in like manner the responsibility of a treasurer of such provisional councils, and limits the duration of the existence of the provisional councils until the dissolution of the union of counties comprising the unior county for which such provisional council was created.

And by section 13 the powers of such provisional councils are expressly limited to such as are necessary for carrying into effect the object of their erection into such provisional municipal council, viz., the purposes stated in the 11th section.

And the 18th section provides for the absolute dissolution of such provisional councils upon and from the identical day upon which by the Act the junior county, for the erection of which as a separate county the provisional council was created, became disunited from the union, viz., the 1st day of January next after the date of the proclamation mentioned in the Act.

Now, if this Act stood alone, it would be clear, beyond all possibility of argument to the contrary, that the obligation, either of the treasurer or his sureties, could not extend beyond the duration of the existence of the provisional council, whose moneys the treasurer was to receive and to account for. The liability to account for moneys received during the continuance of the existence of the provisional

council might continue after it ceased to exist, but the office of treasurer could not continue to exist after the body of which he was treasurer had ceased to exist.

But the 12th section of 13 & 14 Vic. ch. 64, enacts that upon and from the day upon which, by 12 Vic. ch. 78, it was declared that the junior county had become disunited, and the provisional municipal council had become dissolved, the then town reeves and deputy town reeves of the junior county, until replaced by new elections, should be, not the *provisional*, but the actual municipal council of the junior county, which municipal council and their successors should be substituted for the dissolved provisional municipal council, and that the provisional officers of the provisional council should be and become officers of the junior county until the election and appointment of their successors, and that all by-laws of such provisional municipal councils should be and continue in force until amended, altered, or repealed by some by-law to be passed by the municipal council of the junior county.

Now it is to be observed that there is nothing in this section, as there is in the Imperial Statute 10 & 11 Vic. ch. 174, referred to in the *Eastern Union R. W. Co. v. Cochrane*, continuing as valid and effectual in favour of the junior county when formed, "all conveyances, contracts, agreements, mortgages, bonds, covenants, and securities made or entered into with the provisional council." We are not called upon to decide what would be the effect, if the municipal council of the county of Ontario, after being duly established, had, without any further election or appointment, availed themselves of the services of Mr. Paxton as treasurer of the established county under 13 Vic. ch. 64, sec. 12, until removed; for the plea avers that the municipal council of Ontario, in the exercise of the powers vested in them, did repeal the by-law of the provisional council, whereby Mr. Paxton had been appointed treasurer of the provisional council, and did thereby remove him from office, and that afterwards, by by-law passed, it is to be presumed under the authority

of 12 Vic. ch. 81 sec. 171, they appointed him to be treasurer of the county of Ontario.

Under these circumstances it appears to us to be clear, both upon principle and authority, that the obligation of the defendants as sureties does not extend to the acts of the treasurer under such last appointment. Immediately upon the passing of the by-law repealing the by-law of the provisional council appointing Mr. Paxton as treasurer, he ceased to be treasurer, and the obligation of his sureties under the contract which they had entered into must be held to have then terminated. They have entered into no new contract.

The appointment of Mr. Paxton by the municipal council of Ontario, under the circumstances, is a wholly new appointment, to which the defendants who executed the bond sued upon are as much strangers as if any other person than Mr. Paxton had been appointed treasurer of the county.

Judgment will therefore be for the defendants.

*Judgment for defendants.*

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WILLIAMS V. THE CANADA FARMERS' MUTUAL FIRE  
INSURANCE COMPANY.

*Insurance—Condition as to property becoming vacant—Notice of—Authority of agent—Evidence.*

A condition of a policy of insurance provided, that in the event of a failure to notify the company of the premises becoming vacant, or to obtain their consent thereto, the policy became void.

In this case, T., the insured, on the premises becoming vacant, notified the local agent, L., who, it appeared, was also aware of the fact. T. then assigned the policy to the plaintiff, who also, previously to the assignment, had notified the agent, and was informed that it was all right. On the plaintiff obtaining the assignment he took the policy to the agent, paid the transfer fee, and obtained the agent's receipt therefor. The agent then sent the policy to the head office, by whom it was returned with their consent endorsed thereon, and a receipt for the money paid. The agent admitted his knowledge of the vacancy, and did not deny the receipt of the notice; but it did not clearly appear whether the notice had been received by the company itself, and the secretary stated that it had not, and that the agent had no authority to receive it.

*Held*, however, that under the circumstances of this case, the company could not avail themselves of the condition, for they had recognised L. as their agent in the whole dealing, so as to warrant the plaintiff in assuming that notice of the vacancy to him was sufficient.

DECLARATION on a fire policy issued to one Tutton, for three years from 27th May, 1874, on a dwelling house, averring that during the term and before the loss, namely, on the 15th December, 1875, the plaintiff became the owner of the property, and Tutton assigned the policy to him by endorsement, notice whereof was given to the defendants, who ratified the assignment in consideration of \$1 paid by the plaintiff to them; and averring a loss by fire, &c.

Pleas—1. Denial of policy.

2. That the loss did not occur by fire.

3. That the plaintiff had no interest in the property.

4. Setting out a condition, that if the building became vacant and unoccupied, notice should be given to the company that the directors might decide whether it would be prudent to retain the risk; and that failing such notice and consent on the part of the company, the policy should become void: that the house did become vacant for a long time before and up to the fire, without any notice being

given to the defendants that the same was so vacant and unoccupied.

The case was tried before Patterson, J., and a jury, at Cobourg, at the Fall Assizes of 1876.

The fire occurred on the 22nd of May, 1876. The house was in Port Hope.

Tutton proved that some time in November, 1875, he had gone out of occupation, and on the 15th December, 1875, he conveyed to the plaintiff, who was trustee for Mrs. Hall.

One Lodge was the local agent for the defendants in Port Hope, the defendants' head quarters being at Hamilton. Lodge was personally acquainted with all the parties.

It appeared that Lodge had full knowledge that the house was vacant,

Tutton said he saw Lodge nearly every day, and that before he assigned to the plaintiff he told Lodge the house was empty. He also told him of his having assigned to the plaintiff.

Tutton had commenced moving back into the house the day before the fire, and had brought a load of things and left them at the front door.

The plaintiff swore that before he took the assignment he told Lodge the house was empty, and to govern himself accordingly. Lodge said, "All right, Mr. Williams." That when the policy was assigned the plaintiff took it to Lodge, and took his receipt, dated January 21st, 1876, for 50 cents, as received from Mrs. Hall through the plaintiff, as her trustee, for the transfer of Tutton's policy.

On the policy was endorsed the consent of the company signed by their secretary, giving their assent to the transfer to the plaintiff, and an acknowledgment of his paying \$1 recording fee, dated 29th of December, 1875. The fee had been reduced from \$1 to 50 cents.

Mr. Hall, solicitor for William Hall, said he remembered writing a letter to the company in November, notifying them that the house was vacant, but was not very sure about this, and did not remember posting it.

The agent, Lodge, swore that he knew the house was vacant. He did not deny what the plaintiff swore as to notice to him. He also said he would not say he either did or did not notify the head office of the house being vacant. It was not his duty to do so.

For the defence the secretary swore that no notice was ever received by them, and that Lodge had no authority to receive notices of houses being vacant, &c.

The learned Judge entered a verdict for the plaintiff for \$250, with leave to the defendants to move to enter a nonsuit or verdict for the defendants, the Court to draw inferences of fact.

In this term, November 22nd, 1876, *J. K. Kerr*, Q. C., obtained a rule *nisi* to enter a nonsuit or verdict for defendants, pursuant to the leave reserved.

During the same term, December 1st, 1876, *S. Richards*, Q. C., shewed cause. The only question now to be decided is, whether the defendants had notice of the property being vacant. Hall states that he wrote notifying the company. The evidence also shews that Lodge, the local agent, was fully aware of, and was notified of the house being vacant. Both the plaintiff and Tutton swore that they notified him before the assignment, and Lodge does not deny it. Then, on the policy being transferred, he, with full knowledge of the vacancy, accepts the transference fee and gives the plaintiff a receipt therefor, and the policy is then sent to the head office, and the company's assent endorsed on it. Lodge had clearly authority to receive the notice, and if he did not choose to inform the company, they who employ him and hold him out as their agent, and not the plaintiff who has done all on his part, must suffer. At all events the defendants, under the circumstances, are estopped from denying that he had such authority, and the plaintiff should be allowed to reply setting up these facts: *Wyld v. London, Liverpool, and Globe Ins. Co.*, 21 Grant 458, in Appeal, 23 Grant 442; *Campbell v. National Life Ins. Co.*, 24 C. P. 133; *Storms v. Canada Farmers' Mutual Ins. Co.*, 22 C. P. 75; *Kuntz v.*

*Niagara District Mutual Fire Ins. Co.*, 16 C. P. 573; *Fourdrinier v. Hartford Fire Ins. Co.*, 15 C. P. 403; *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant 418.

*J. K. Kerr*, Q. C., contra. The evidence as to notice being given to the agent is very unsatisfactory, and is no more than a casual notice given on the street. The notice should have been given to the head office, and not to the local agent. All the cases shew that where the notice is of something that requires the decision of the head office, the notice must be given to them. Here the head office alone had the power of assenting or dissenting to the further continuation of the policy, and therefore they alone could receive the notice: *Hendrickson v. Queen Ins. Co.*, 30 U. C. R. 108, in Appeal, 31 U. C. R. 547. As to the defendants under the circumstances being estopped by the assignment, its only effect was to place the plaintiff in the position of Tutton, and render him liable to fulfil all the conditions of the policy. As to Hall's evidence as to giving written notice to the company, no effect can be given to it, for he could not say whether it was ever posted, and the company expressly deny ever having received it.

December 28th, 1876. HAGARTY, C. J.—It seems clear that Lodge had notice, but it is not proved that he notified the company, and there seems some doubt as to Mr. Hall having written to them.

I do not see anything in the objection that the plaintiff had no legal interest when he gave notice to Lodge that the house was vacant. I infer from the evidence that he was interested, and that his notice could not be regarded as that of a stranger.

I do not think it necessary to plunge into the general question as to whether a notice of this character is sufficiently given to a local agent like Lodge.

I think this case not necessarily depending on any question of general authority.

Lodge was the immediate agent of the company in the

management of the transaction by which alone the present plaintiff acquired an interest in this insurance.

The plaintiff applies to Lodge, informing him of his position, and produces to him the assignment from Tutton. Lodge is directly informed of what in fact he knew perfectly well already, that the house was then vacant. He receives from the plaintiff the fee charged by his company for recording this transfer. He sends the policy so transferred to the company, by whom it is returned with their written assent, and their receipt for the recording fee.

Now, in all this transaction the company deal with the plaintiff through Lodge as their agent. As a corporation they can only deal by agent, and I see no agent here representing them to the plaintiff but Lodge. If he take the transfer fee, however small, from the plaintiff, and sends it to his principals, and he have the notice as to the vacancy, I think he was as much bound to communicate that notice to them as to send the fee and obtain their consent to the transfer to plaintiff.

If we hold otherwise, then the result must be, that the plaintiff, dealing with this corporation only through Lodge, their agent, is knowingly allowed to enter into this transaction and take an assignment of the policy, and consider himself insured, while all the time the whole thing is a void proceeding, because the agent neglects his duty to inform his principals.

Who is to suffer for Lodge's neglect, if there were any neglect? Is it the plaintiff who never employed Lodge, or the company who did employ him?

I do not propose to enter into the wide discussion open to us, if we make the case depend on the actual position of the assignee of a policy becoming such with the underwriters' assent.

The cases, from *Burton v. Gore District Mutual Ins. Co.*, 14 U. C. R. 342, 12 Grant 156, downwards, are not completely reconcilable.

This insurance is not on the mutual, but on the cash premium principle.

If the defendants' view be correct, then it follows that

at the date of their formal assent to the assignment to the plaintiff (of 9th December, 1875), the policy was void, and there was nothing to transfer or assent to.

I am well aware of the great diversity of judicial opinion on the question of how far insurance companies are to be affected by notice to or the knowledge of their local agents. I confine my decision to the special facts of this case.

If, when the plaintiff applied for the assent to the assignment to him, he had been referred to the head office, he would at once have known he could only deal with them. But the company recognized expressly his dealing with Lodge, received the fee, and executed the assent through him. They thus, I think, fully recognized him as their agent in the whole dealing, and warranted the plaintiff in assuming that his notice of the vacancy to Lodge was sufficient as given through a channel recognized by them—the only channel known to him.

Of course it is argued for the defendants that all this was merely the obtaining of their assent to the plaintiff stepping into Tutton's place in the insurance contract, and that he assumes the contract with all Tutton's responsibilities as to the conditions. But it appears to me that we must look somewhat further, and not allow the plaintiff's interest to be defeated by so bald a definition of the character of the transaction. It was a deliberate acceptance of the plaintiff as a contracting party with them, not the idle ceremony of recording him as a party to a bargain already void, and I think they must be bound by any notice proved to be given to the agent to whom the arrangement of the contract is entrusted by them.

It does not resemble the case of setting up a notice to a local agent of something that contradicts the written terms of the contract.

GWYNNE, J.—Mr. Richards, upon the part of the plaintiff, thinking the issue joined upon the fourth plea not sufficient to raise the point, urged at *Nisi Prius*, and before us, as entitling the plaintiff to retain his verdict, for leave so to reply to that plea as to raise the point argued.

I regard the case, then, as upon a replication filed *nunc pro tunc* by leave of the Court. Such replication, as it appears to me, should be in the nature of estoppel *in pais*, or upon equitable grounds; and should be in substance to the effect, that the plaintiff and Tutton, the insured, before assignment of the policy to the plaintiff, gave notice to one Lodge, who then, until, and at, and after the time of the assignment of the policy to plaintiff, was general agent of the defendants at Port Hope; and that after giving such notice, the plaintiff applied to the said Lodge, as such agent, to procure the consent of the defendants to an assignment of the policy to the plaintiff, and the defendants employed the said Lodge, as their agent, in effecting such assignment and in receiving a certain fee payable by the plaintiff to the defendants in respect of such assignment; and the plaintiff says that the said Lodge, having such notice as aforesaid that the said house was vacant, negotiated with the plaintiff and effected, as agent of the defendants, the perfection of the said assignment of the said policy from the said Tutton to the plaintiff, who thereupon paid to the said Lodge, as agent of the defendants, the fee demanded by them upon their consenting to such assignment, which they did in manner and under the circumstances aforesaid; and so the plaintiff says that the said defendants should not now be permitted to say that the assignment so effected of the said policy was void, or that the defendants had not notice of the said house having been and being vacant at the time the assignment of the said policy to the plaintiff was made and assented to by the defendants.

I think the evidence supports such a replication, and that, therefore, the circumstances of this case are such as to make it inequitable for the defendants to set up the defence urged in the fourth plea, without requiring us to decide the general question, whether Lodge was such an agent, to whom notice of the house being *vacant* could be given so as to affect the defendants, without more.

GALT, J., concurred.

*Rule discharged.*

## ADAIR v. THE CORPORATION OF THE CITY OF KINGSTON.

*Municipal corporations—Defect in highway by third person—Liability.*

In an action against defendants for an accident to the plaintiff by falling into a drain, which had been opened or dug in a street at one of the most frequented places in the city, and which had remained in an unprotected state for a considerable time, the men having been engaged in working at it nearly a month.

*Held*, that it was no defence that defendants did not make or authorize the drain to be dug, as under the circumstances they must be deemed to have had the fullest notice.

THIS was an action against the defendants for injuries sustained by the plaintiff by falling into an open drain.

The cause was tried before Wilson, J., and a jury, at Kingston, at the Fall Assizes of 1876.

It appeared that some person, without the authority of the council, opened or dug a drain from Clergy street into Princess street, in the city of Kingston; and that the men working at it were engaged in so doing 29 days. Where it came into the latter street it was covered over by some planks, and so remained for a considerable time. This point was one of the most frequented in the city.

The jury found for the plaintiff, with \$500 damages.

In this term, November 23rd, 1876, *MacLennan*, Q. C., moved to set aside the verdict for the plaintiff, and to enter a verdict for the defendant, pursuant to the leave reserved.

In this term, December 7th, 1876, *M. C. Cameron*, Q. C., shewed cause. It is not necessary to prove that the corporation were making the drain themselves, or that they authorized it to be made. It is the duty of the corporation to see that the streets are in repair, and this covers a want of repair. Express notice to the corporation need not be proved, but it will be implied from the circumstances. As to contributory negligence, it was for the jury, and they have found there was none. The whole question in this case was one for the jury: *Ringland v. Corporation of Toronto*, 23 C. P. 93; *Toms v. Corporation of Whitby*, 35 U. C. R. 195.

*MacLennan*, Q. C., contra. The corporation cannot be

held liable unless it be proved that the nuisance is made or authorized by them; and there is no such evidence here. It must also be proved that the corporation had notice, and the notice must be brought home to them. The evidence also shews that the accident was caused by the plaintiff's own carelessness. Under the circumstances the verdict should have been for the defendants: *Hutton v. Corporation of Windsor*, 34 U. C. R. 487; *Boyle v. Corporation of Dundas*, 25 C. P. 420; *Rounds v. Corporation of Stratford*, 25 C. P. 123; *Bateman v. City of Hamilton*, 33 U. C. R. 244.

December 28th, 1876. HAGARTY, C. J.—It was pressed by Mr. Maclellan that the defendants were not responsible, as not having made or authorized the opening of the streets.

It seems very plain to us that this is no defence on the facts before us.

It was proved that the men were 29 days, almost an entire month, working at this drain; and the council must be taken to have the fullest notice of such a work being carried on in the principal street of their city.

They have full power to prevent and remedy any such proceeding, if unauthorized.

We can easily understand an unauthorized opening of a street done so recently as to be naturally unknown to the municipality, and an injury resulting therefrom before such notice or knowledge. In such a case the objection might be plausibly urged. It is not necessary for us to decide on its validity. In the case before us it is impossible to entertain it.

On the general merits of this case, we do not see how we can interfere. The investigation was very full, and the case most carefully left to the jury.

Every defence was raised: that the plaintiff contributed to the accident: that he was intoxicated: that the place was sufficiently protected; and that his injuries were trifling.

We cannot say that on any of these points the verdict is clearly wrong, or even against the weight of evidence.

We are certainly not satisfied that this crossing, open so long in the heart of the city, where numbers were necessarily passing, night and day, was sufficiently protected, as it might easily have been by something like a safe gang-way with sides.

With a strong disposition to see municipalities fairly protected in cases of this character, we fail to see any such objection as would warrant our interference.

As to the damages it may be that they may be on a liberal scale but we cannot say they are excessive. The jury evidently believed that the man was ruptured, and there was evidence leading to that conclusion.

We have also consulted the learned Judge, and he is not dissatisfied with the verdict.

GWYNNE, J.—I do not think that the point can admit of a doubt, that the defendants are just as responsible for an injury arising by reason of an excavation made in one of the streets of their city by persons not authorized so to do, as they would be if they had made the excavation themselves; and as to the verdict, I cannot say that it is not supported by the weight of evidence.

GALT, J., concurred.

*Rule discharged. (a)*

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(a) See *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113.

BOYLE ET UX. V. THE CORPORATION OF THE TOWN  
OF DUNDAS.

*Municipal corporations—Defective sidewalk—Want of repair—Accident—Contributory negligence—New trial refused.*

On the second trial of this case (see 25 C. P. 420), the jury in answer to questions submitted to them found in substance, that though defendants had generally performed their duty as to the repair of the sidewalks, yet in this case the sidewalk was not in a reasonably sufficient state of repair; and that, though plaintiff by watching her steps, &c., might have avoided the hole, yet that she exercised that due care and caution that a person would ordinarily use, under the circumstances.

*Held*, that on this finding the plaintiff was entitled to recover.

THIS was an action for injuries sustained by the female plaintiff by falling on a defective sidewalk in the town of Dundas.

The cause was tried by Sinclair, Co. J. of Wentworth, sitting for Wilson, J., and a special jury, at Hamilton, at the Fall Assizes of 1876.

The cause had been previously tried and a verdict rendered for the plaintiff, with \$800 damages, which was set aside, and a new trial granted, with costs to abide the event. See 25 C. P. 420.

At the last trial the learned Judge submitted certain questions to the jury, which were as follows:—

1. Was the sidewalk in that ordinary state of repair that was reasonable to expect of a municipality of the size and population of Dundas? No.

2. Did the plaintiff, Hannah Boyles, while walking on the defendants' sidewalk on the morning of the 17th of January, 1875, exercise that due care and caution that a person ordinarily would under the circumstances? Yes.

3. From the knowledge or information that the female plaintiff previously had of this sidewalk, could she have escaped the accident if she had been looking where she was going? Yes.

4. Was the female plaintiff at the time of the accident walking on that part of the sidewalk ordinarily travelled upon? Yes.

5. Had the defendants notice of the hole in this sidewalk sufficient time before the accident to enable them to make the necessary repair?

No answer apparently was given to this question.

6. Did the defendants for the year prior to the accident, and up to the time of the accident in the year 1875, use due diligence in the repair of the sidewalks of their town? Yes.

7. How did the accident occur? By stepping partially over the hole, causing the foot to go in.

8. How much damage did the female plaintiff sustain? \$150.

9. How much damage did the plaintiff John Boyle sustain? \$150.

On the answers to these questions the learned Judge entered the verdict for the plaintiffs, but reserved leave to the defendants to move to enter a nonsuit.

In Easter Term, May 31st, 1876, *Osler*, Q. C., obtained a rule *nisi* to set aside the verdict for plaintiff and enter a verdict for the defendants, on the grounds that the answers of the jury to the third question was a finding in effect of contributory negligence on the part of the female plaintiff, and on the ground that the answer of the jury to the sixth question was a finding that there was no negligence on the part of the defendants: or for a new trial, on the ground that the verdict herein was against evidence, and the weight of evidence in this, that the evidence of the female plaintiff and the witnesses called on her behalf shewed that there was no negligence on the part of the defendants, and also on the ground that the answers of the jury to the questions put by the Judge are inconsistent and contradictory.

During this term, December 1st, 1876, *S. Richards*, Q. C., and *Robertson*, Q. C., shewed cause. The question of repair or non-repair is purely one for the jury, and cannot be withdrawn from them. Under the Act the liability to keep the streets in repair is a positive duty cast upon the

corporation, the neglect to perform which amounts to a misdemeanour, and also renders them liable to a civil action. The whole question is, have they substantially performed their duty? It is not like the question of the performance of some work, where the question would be, have they negligently performed the work. The answers to the 1st, 2nd, and 4th questions are conclusive as to the plaintiffs' right to recover. The 3rd question cannot affect the plaintiff, as it cannot be expected that unless persons watch each step they make, they are without remedy. As to the 6th question, it cannot make any difference how much the corporation spent in sidewalks, so long as they are proved to be out of repair; and it is no defence that the sidewalk was in repair a year ago. The evidence also shews that the sidewalk was out of repair for over two months, and there was plenty of time to have put it in repair: *Sherwood v. Corporation of Hamilton*, 37 U. C. R. 410. The only reason for previously granting the new trial was because the Court considered the damages excessive, and there can be no complaint on this ground now.

*Osler*, Q. C., contra. There clearly should have been a nonsuit entered. The plaintiff herself admitted that she was well aware of the hole being there, and did not consider it dangerous; while her attorney stated in his evidence that if she had been looking out for it, she could not help avoiding it. This in effect therefore is what is intended by the third question, and its answer concludes the plaintiffs: *Hutton v. Corporation of Windsor*, 34 U. C. R. 487; *Winckler v. Great Western R. W. Co.*, 18 C. P. 250; *Nicholls v. Great Western R. W. Co.*, 27 U. C. R. 382. The plaintiffs must prove their case affirmatively, and it was necessary that the answer to the fifth question should have been in the plaintiffs' favour, so as to shew that the corporation had sufficient notice to have enabled them to have made the repairs necessary; while the answer to the sixth question shews that there was no negligence in the corporation, but that they used due diligence. If, however, the Court consider the answers inconsistent, then there must be a new trial.

December 28th, 1876. HAGARTY, C. J., delivered the judgment of the Court.

We can best understand these answers by putting them in the form of a statement, thus :

That the defendants, for the year prior to the accident and up to it, used due diligence in the repairs of the sidewalks of their town ; (but) that this sidewalk was not in that ordinary state of repair that was reasonable to expect from a municipality of the size and population of Dundas.

That the female plaintiff, from her previous knowledge of this sidewalk, could have escaped the accident if she had been looking where she was going ; (but) that she did exercise that due care and caution that a person ordinarily would under the circumstances.

No statement is made as to notice to the defendants.

We have very fully expressed our views on the general question in the former judgment in this cause.

The learned Judge has here entered the verdict for the plaintiffs for the amount assessed as damages by the jury on the answers to the questions submitted.

The facts before us amount to this : That although the defendants had generally performed their duty as to the sidewalks in a reasonably diligent manner, yet, in this particular case, the sidewalk was not in a reasonably sufficient state of repair.

We think we must read this finding as against the defendants on the point of repair or non-repair, which is always a question of fact for the jury, and cannot generally be withdrawn from them.

As to contributory negligence, this also is generally a matter of fact for the jury, and not of law for the Court, where there is some evidence of negligence.

On this the jury find in effect that, although by watching her steps, &c., she might have avoided the hole, yet that she used that due care and caution that a person would ordinarily use under the circumstances. This is in her favour on this point.

We cannot lay it down as matter of law that a person walking along a street loses all remedy for injury if she or he happen to be looking away at the moment.

The damages are moderate if the plaintiffs be entitled to recover.

As to the question of notice to the defendants, the answer is involved in the finding of their default as to this sideways.

As to the weight of evidence, we do not hesitate to say that, as we read it, we should have found for the defendants on the general merits. But we are not prepared to order a third trial under all the circumstances.

In the exercise of Judges' discretion in granting new trials on the weight of evidence, there are many things to be considered. In a case not free from doubt, where, there being evidence relied on by both parties, and the issue depending on the opinion jurors may form of the conduct of parties in executing a statutable duty, after two trials, and no very large amount being involved, we hardly feel justified in further interference.

*Rule discharged.*

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WELSH ET AL. V. THE NIAGARA DISTRICT MUTUAL FIRE  
INSURANCE COMPANY.

*Insurance—Proofs of loss—Cash or mutual policy—Pleading.*

To an action by plaintiffs against defendants for the non-payment of the amount of a policy issued by defendants, so far as the declaration shewed, on the cash system principle, defendants pleaded that the plaintiffs did not deliver to defendants the proofs of loss required by said policy three months before the commencement of the action.

*Held*, no defence; for even if under the Mutual Companies' Act, 36 Vic. ch. 44, sec. 33, O., such lapse of time was necessary, that Act merely applied to mutual and not to cash system policies.

DECLARATION:—For that by a policy of insurance bearing date the 17th September, 1875, made by the defendants, after reciting that the plaintiffs had paid the defendants \$14 for insuring against loss or damage by fire to the amount of \$200, on a frame carpenter's shop; \$150 on carpenters' tools and mortising machine; and \$350 on stock manufactured or unmanufactured in said policy described, for one year from the 7th September, 1875, to the 7th September, 1876, it was declared that, subject to the provisoes, limitations, and conditions endorsed and contained in the said policy, the plaintiffs should be paid out of the capital stock and funds of the said company all losses or damages, not exceeding in the whole \$700, which should or might happen to the aforesaid property by or by reason or by means of fire during the time the said policy was in force; and the plaintiffs at the time of making of the said policy, and thence until and at the time of the damage and loss hereinafter mentioned, were interested in the said several premises so insured as aforesaid to the amounts so insured therein respectively; and after the making of the said policy, and whilst it was in force, the said several premises and properties so insured, as aforesaid, were burned, damaged, and destroyed by fire, whereby the plaintiffs suffered loss and damage in the said shop, tools, and mortising machine, and stock respectively to the several amounts so insured thereon respectively as aforesaid; and all conditions were fulfilled, &c., yet the plaintiffs have

not been paid out of the said capital stock and funds of the said company the amount of the said damage and loss to the amount of the said sums so insured respectively as aforesaid, and the same remains wholly unpaid.

Seventh plea: That the plaintiffs did not deliver to defendants the proofs of said claim required by the said policy three months before the commencement of this suit.

Replication: That before the expiry of three months after the delivery of the proofs of claim of the plaintiffs, and before the commencement of this action, the defendants absolutely refused to admit the plaintiffs' claim, and to pay the amount thereof.

To this replication the defendants demurred, on the grounds:

1. That the replication neither traverses nor confesses and avoids the plea.

2. That the loss by the terms of the statute was not payable until three months after the receipt by the defendants of the proof of loss, whether defendants admitted them or not.

3. That the replication is no answer to the plea.

The plaintiff took the following exceptions to the plea:

1. That it contains no answer or defence to the cause of action declared upon.

2. That it is not alleged in the said plea that the board of directors of the defendants had ascertained and determined the amount of the plaintiffs' loss or damage.

On the 26th September, 1876, the demurrer came on for argument before Galt, J., when judgment was delivered in favour of the plaintiffs.

From this judgment defendants appealed to the full Court.

During this term, November 28th, 1876, the demurrer was argued.

*Osler* for the defendants. The Mutual Insurance Company's Act, 36 Vic. ch. 44, is by the 77th section made

applicable to the defendants, and by the 33rd section no claim is payable until the lapse of three months after the delivery of the proofs of loss. The lapse of the three months is clearly a condition precedent to the right to sue. The plea is therefore a good defence to the action. The replication is no answer to the plea. The company's refusal to admit the claim does not amount to a waiver of the right of the company to insist on the requirements of the statute being complied with: *Storms v. Canada Farmers Mutual Ins. Co.*, 22 C. P. 75; *Hatton v. Provincial Ins. Co.*, 7 C. P. 555.

*J. K. Kerr*, Q C., contra. The 52nd section of the 35th Vic. ch. 44, merely applies to the mutual and not to cash system policies. The word "member" being used clearly shews this. From all that appears in the declaration this may have been a cash system policy, under which the insured would have been entitled to an immediate right of payment. The Act, however, does not prohibit any action being brought within the three months, but merely provides that the money need not be paid before that time shall have elapsed. Moreover the company by their refusal to entertain the plaintiff's claim have waived their right to insist on the statutory limitation: *Storms v. Canada Farmers Mutual Ins. Co.*, 22 C. P. 75; *Danube, &c., R. W. Co. v. Xenos*, 11 C. B. N. S. 152, 13 C. B. N. S. 825; *Beckett v. Cockburn*, 31 U. C. R. 610; *Dullea v. Taylor*, 34 U. C. R. 12; *Mitchell v. Great Western R. W. Co.*, 35 U. C. R. 148; *Rice v. Provincial Ins. Co.*, 7 C. P. 548; *Ætna Ins. Co. v. Maguire*, 51 Illinois 342; *Baltimore Fire Ins. Co. v. Loney*, 20 Maryland 20, 40; *Lewis v. Monmouth Mutual Fire Ins. Co.*, 52 Maine 492.

December 28th, 1876. HAGARTY, C. J., delivered the judgment of the Court.

I think the plea is no answer to the declaration. No ground is shewn for pleading anything about the non-delivery of proof three months before the action. We are told that this is under the statute as to Mutual Insur-

ance Companies. We have no reason for knowing that the insurance was effected on any mutual principle, or that the plaintiffs became members of such mutual company. We do know that such companies effect insurances on the cash premium principle, and find that the contract set out in the declaration seems clearly to have been not on the mutual principle. The premium was paid in cash, and the loss was to be paid out of the capital stock of the company, &c.

The plea seems no defence whatever.

It is therefore unnecessary to discuss the replication.

*Judgment for plaintiff.*

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#### NAGLE V. LATOUR.

*Nisi Prius submission—Award thereunder—Motion to set aside—C. L. P. Act, sec. 160, 39 Vic. ch. 28, sec. 5. O.*

*Held*, that the Act 39 Vic. ch. 28, sec. 5, O., does not apply to *nisi prius* references by consent under the 160th section of the C. L. P. Act, so as to enable the Court to reopen the award on the general merits.

*Quære*, whether the Act applies in any case to references entered into before its passage.

The question of costs considered.

This cause was entered for trial at the Ottawa Assizes, before Richards, C. J., without a jury, on 7th October, 1873, and by order of reference, it was ordered by the Court, by and with the consent of the parties, that a verdict be taken for the plaintiff, subject to be increased or diminished, or a verdict entered for the defendant, pursuant to the award of Robert Lyon, Esq., to whom all matters in differences were referred; the costs of the cause to abide the event; the costs of the references to be in the discretion of the arbitrator. And this order was signed by the attorneys for both parties.

Many enlargements appeared to be indorsed thereon.

The usual consent was indorsed on the record, signed by both counsel, and by the learned Chief Justice.

On the 22nd May, 1876, an award was made in favour of the plaintiff for \$347.50, to which sum the verdict was to be increased.

In Trinity term, 31st August, 1876, *Beaty*, Q. C., for the defendant, obtained a rule *nisi* calling on the plaintiff and his attorney to shew cause why the record, order of reference, rule of Court thereon, and the award, exhibits, evidence, and papers in their possession, should not be produced and filed in Court, with a view to a motion to set aside the award, and why the arbitrator should not produce the depositions and evidence taken by him, under the statute.

On the same day a motion was made to set aside the award and verdict, but as the record, &c., was not forthcoming, the motion paper was merely filed, and the rule above mentioned was granted.

On 6th September this rule was served.

On 7th September, notice of taxation of the plaintiff's costs was served.

On 8th September the plaintiff taxed his costs. The defendant attended by his attorney or agent. On the same day judgment was signed for the amount of the award and costs. On the taxation the record and award were produced by the plaintiff. The defendant protested against these proceedings, on the ground that the rule had issued.

On 9th September, the defendant set the rule down for argument,—but, not being reached, it stood over till next term.

On the 9th September, execution was issued.

On the 18th September, being the day after term on which judgments were delivered, *Allan Cassells* obtained a rule *nisi*, calling on the plaintiff to shew cause on the first day of Michaelmas term next, why the judgment and execution should not be set aside, as being signed and issued

pending the previous rule, and because the motion paper to set aside the award, &c., had been filed by leave of this Court, and judgment had been entered before such motion was disposed of.

By this rule the proceedings were ordered to be stayed.

In this term, November 27th, 1876, *Osler*, shewed cause. There was no necessity for the plaintiff bringing into Court the submission and award, as the submission had been made a rule of Court, and defendant might have obtained an exemplified copy of it, and a certified copy of the award would have been sufficient. As to the evidence, the submission having been made by the consent of the parties, under the 160th section of the Common Law Procedure Act, and their being no provision in the submission under the 10th section of the Act, 39 Vic. ch. 28, O., for an appeal, no such appeal was allowable, and therefore there could be no necessity for bringing in the evidence. The 5th section of 39 Vic. ch. 28, O., does not authorize an appeal on the merits, but merely in such cases as were allowable before the passing of the Act, namely, where there has been some misconduct or mistake on the part of the arbitrator: *Russell on Awards*, 4th ed., 628; *Tanner v. Sewery*, 27 C. P. 53; *Cromer v. Churt*, 15 M. & W. 310; *VanNorman v. Bridgeford*, 2 U. C. L. J. N. S. 132. As to the other rule, the judgment was regularly signed, as the rule first granted contained no stay of proceedings: *Emblin v. Dartnell*, 12 M. & W. 830; *Lloyd v. Berkovitz*, 16 M. & W. 31; *Arch. Prac.*, 12th ed., 1537, 1583, 1601.

*Beaty*, Q. C., contra. The motion to set aside the award being in the nature of a motion for a new trial, it was necessary for the defendant to have the record before the Court, before he could move. The reference here being made at *Nisi Prius* the record should have remained with the clerk for him to endorse the award on it. The record not being in Court it was necessary for the defendant to move to have it brought in, as also the other papers. The rule granted had the effect of staying the proceedings. Under No.

130 of the rules of Court, *Harrison's C. L. P. Act*, 2nd ed., p. 686, a two days notice of the intended motion causes such stay, and such notice was given here. Also the motion paper for a rule to set aside the award had been filed, pending the papers being brought in. Under these circumstances the judgment was irregularly signed: *Arch. Prac.*, 12th ed., 524, 1634; *Kenrick v. Phillips*, 7 M. & W. 515. As to bringing in the evidence and papers, this was in fact a compulsory reference under the 158th section of the Common Law Procedure Act, and therefore comes within the 1st and 2nd sections of the 39 Vic. ch. 28, O., so as to authorize an appeal on the merits. For although the submission on the face of it appears to be by the consent of the parties, the practice is for the Judge to order the cause to be referred, and then the parties, in deference to his ruling, agree to the submission and name an arbitrator.

December 28th, 1876. HAGARTY, C. J., delivered the judgment of the Court.

It was conceded by Mr. Beaty, that his motion for the setting aside or reviewal of the award could be only successful under the late Statute of Ontario, 39 Vic. ch. 28, which became law on the 10th February, 1876.

The reference here was by consent of the parties, not in any way, as appears by the papers, as a compulsory reference.

Sec. 1 of the new Act applies to references under sec. 158 of the Common Law Procedure Act, and more pointedly than before substitutes a new section, specially making it applicable only to references before the entry of the record for trial, and apparently allows the Judge in his discretion to act as referee himself and decide the case.

Sec. 2 is also directed to references under that section.

Sec. 3 provides for the transmission of the depositions, reports, &c., taken under this Act to the principal officer in Toronto, for the purpose of appeal or motion.

Sec. 4 provides that in references under sec. 160 of the

Common Law Procedure Act, the depositions should be taken in writing and should be lodged with this Court.

This sec. 160 provides for compulsory references. After the Judge has decided the reference, the parties may agree upon the referee if they please.

Sec. 5 provides that on motions to set aside awards under sec. 160, the Court or Judge need not remit it back to the arbitrator, but may pronounce and make the award which, in their judgment the arbitrator ought to have made.

Sec. 6 does not bear upon the point.

Sec. 7 provides how the appeal under sec. 2 shall be heard.

Sec. 8 refers to County Courts.

Sec. 9 has no bearing.

Sec. 10 and the last section provides that, in case of a voluntary reference to arbitration, when it is agreed by the terms of the submission that there may be an appeal to one of the Superior Courts, this Act shall apply, and the reference shall be conducted in the manner decided by this Act, and an appeal shall lie in the same manner as in case of a reference in causes pending in Court.

Our opinion is, that the ordinary reference by consent on a *Nisi Prius* order is not affected by this Act, and that we have no right to reopen the case merely on the general merits.

The Act is made to apply to compulsory references, and to references before the record had been entered for trial, and leaves, in our judgment, untouched a reference like that before us.

Judging by the language of sec. 10, it may be that the framers of the Act possibly may have intended to apply its provisions to all references, but the language used does not we think, so provide.

Had we arrived at a different conclusion, we should have paused long before holding that this statute applied to references made by the parties two or three years before its becoming law.

The contract of the parties was to abide finally by the

award of the referee named, and not consenting to an award to be modified or totally changed by the opinion of a Judge of the Superior Court.

For the words "order of reference made," we might probably have to read, "to be made."

But we decide the case on the broadest ground.

My brother Gwynne, in a case *Tanner v. Sewery*, 27 C. P. 53, lately decided in accordance with this view.

As therefore the main application against the award fails, we think we must give the plaintiff his costs of opposing the same—that is, the costs of one answer and argument.

As regards the other rule of Mr. Beaty, we discharge it without costs.

*Rules accordingly.*

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### HAWN ET AL V. ROCHE.

*Shipping—Goods supplied to vessel—Contract by master—Evidence of ownership—Liability.*

In an action against defendant for goods supplied by plaintiffs to certain vessels, at the request of the masters' thereof, there was no evidence of defendant having employed the masters, and though the vessels appeared to have been transferred to defendant before the goods were supplied, the transfers were not registered until after, nor was any express contract with defendants proved.

*Held*, that defendants were not liable.

THIS was an action brought to recover the price of certain goods furnished and money paid on account of two vessels, the "Alpha" and the "Thurston."

The cause was tried before Harrison, C. J., without a jury, at St. Catharines, at the Fall Assizes of 1876.

The only evidence relied on at the trial to fix the defendant with liability was the proof that the vessels seemed to have been transferred to defendant prior to the time

when the supplies were furnished ; but it appeared that the transfer was not registered until December, 1875.

It appeared that in 1873, the plaintiff had had dealings with one McAdam, who was the owner of the vessels before he transferred them to the defendant.

Mr. Hawn said at the trial : " I first commenced to deal with the 'Thurston' in 1872 and 1873. The account for 1873 was settled. It was settled by draft on Mr. McAdam. I continued to deal with the vessel in 1874. I made no enquiries as to the ownership of the vessel, but in 1873 was given to understand that McAdam was only agent, and the defendant owner. (He did not say how he obtained this understanding). I have no recollection of making any enquiry while furnishing the goods. I dealt with the vessel in 1874, as in 1873. In 1874 I drew upon McAdam & Co.; but the draft was not cashed."

In the examination which was taken before the trial under an order made in Chambers, and which was put in at the trial, he stated : " This action is brought for goods and cash furnished to the vessels "Thurston" and "Alpha" in the year 1874." The charges are made, as we always make them, against the vessels, not against the individual owners. All the charges in the particulars, with the following exceptions, are for the barque "Thurston." The charges for August 10th, 11th, and 13th September are for the schooner 'Alpha.' The goods furnished to the barque 'Thurston' were ordered by the captain, R. Manley, and the steward. I did not know who was the owner of the barque "Thurston" at the time we furnished the goods. We did not make any enquiry to find out who was the owner while we were furnishing the goods."

The captain, Manley, was not called as a witness, and there was no evidence to shew by whom he had been appointed.

The learned Chief Justice entered a verdict for the plaintiffs for \$543.89, with leave to the defendant to move to enter a verdict for the defendant, or a nonsuit, or to reduce the damages.

In this term, November 22nd, 1876, *Osler* obtained a rule *nisi* pursuant to the leave reserved.

During the same term, December 1st, 1876, *J. A. Miller* (St. Catharines) shewed cause. There was sufficient evidence of the defendant being the owner of the vessels. The plaintiff himself stated that he satisfied himself that defendant was owner. The defendant was also in possession of the bills of sale at the time; and it was not necessary that they should have been registered. This is sufficient evidence to raise a presumption of ownership, which should have been rebutted by the defendant; and it is quite clear that the owner is liable for the contracts of the master for necessities supplied to his vessel. Even assuming that defendant was merely charterer, he was during the currency of the charter party in the same position as the owner, so as to be liable for the contracts of his captain: *Lake Superior Navigation Co. v. Beatty*, 34 U. C. R. 201; *Maclachlan on Shipping*, 2nd ed., 131.

*Osler contra.* This evidence is clearly insufficient to prove defendant's ownership of the vessels. The mere fact of defendant being in possession of the bills of sale, of which the evidence is not clear, is not sufficient, as under the statute, until registry, no property passes. The proper inference to draw from the fact of the defendant not registering the bills is, that the ships were not sold, or that the sale had fallen through. In order, therefore, to impose any liability on the defendant, the plaintiff should have proved an express contract between him and defendant. There is also no evidence to shew that these were necessities: *Maclachlan on Shipping*, 2nd ed., 105; *Mitcheson v. Oliver*, 5 E. & B. 419; *Hibbs v. Ross*, L. R. 1 Q. B. 534; *The Great Eastern*, L. R. 2 Ad. 88; *The Riga*, L. R. 3 Ad. 516; *The Two Ellens*, L. R. 3 Ad. 345.

December 28th, 1876. GWYNNE, J.—Upon the authority of *Frost v. Oliver*, 2 E. & B. 301, and *Mitcheson v. Oliver*, 5 E. & B. 419, as commented on and explained in *Hibbs v. Ross*, L. R. 1 Q. B. 534, I think that the

legal title to a ship does afford *prima facie* evidence that the master navigating the ship is employed by, and is the agent of the owner, and that such evidence, when unexplained, will authorize a jury properly to draw the inference that the owner did employ the persons actually in charge of the ship; but if it be made to appear in answer to such evidence that in fact the master was not appointed by the owner, but was in charge by the appointment of, and as agent of another, then the owner is under no responsibility for the acts of the master.

However, I concur that in this case there must be a nonsuit, for the evidence failed to shew the legal title, by which I mean title on the registry, to be in the defendant during the time when the supplies for which this action was brought were furnished to the masters of the vessels. Whether the defendant had the bills of sale in his possession in the interval between their date in December, 1873, and January, 1875, when he registered them, did not appear, and I cannot say that I think that there is any legal presumption that he had or had not. But assuming him to have been in possession of the instruments, I rather think the proper inference to draw from the fact of his not putting them on registry, is, that he was unwilling to assume the position of legal owner at that time; and as the statute relating to the sale of ships makes the legal title consist in the registration, I am of opinion that no presumption of the captain of the vessels being employed by the defendant arises from the fact of bills of sale having been executed, purporting to convey the vessels to the defendant, which he did not put upon registry. The defendant's not registering the bills of sale is quite consistent with an arrangement between him and the registered owner, that he should hold the bill of sale as a security, which, in a given event, he might put upon registry, thereby assuming the ownership; but that until he should do so, the vendor should continue to use, navigate, and enjoy the ships for his own use and benefit, precisely in the same manner as before.

The defendant not having been shewn to be in the position of legal owner until the registration of the bills of sale in January, 1875, there was no evidence whatever to connect the masters of the respective vessels, to whom the plaintiffs supplied goods, with the defendant.

From the letter of McAdam to the plaintiffs, of the date of December 7th, 1874, which is attached to the examination of the plaintiffs, but is not legal evidence of the matters therein alleged, it would seem that the plaintiffs could have given evidence, which if produced would have been sufficient to establish the liability of the defendant, if the articles supplied were necessities for which the master could have bound the owner, as to which I express no opinion.

The rule will be absolute to enter a nonsuit.

GALT, J.—In *Mitcheson et al. v. Oliver*, 5 E. & B. 419, in the Exchequer Chamber, Parke, B., in giving judgment says, at p. 443: "None of us, I believe, have doubted that the jury came to the wrong conclusion, and that the verdict ought to have been for the defendant, on this single ground, that no contract can bind a defendant unless made by some one who had real authority to bind him, or unless the defendant is precluded from denying that there was authority in the person who made the contract. It is perfectly settled now that the liability to pay for supplies to a ship depends on the contract to pay for them, and not on the ownership of the ship."

In *Hibbs v. Ross*, L. R. 1 Q. B. 534, which was an action for negligence, the Court was divided in opinion.

Blackburn, J., in giving the judgment of the majority, at p. 542, says: "In all cases in which the owners of a ship are sought to be made liable, either in contract for necessities supplied on the order of the captain, or in cases of collision for the negligence of the crew, or, as in the present case, for the negligence of the shipkeeper, I think that the question really is, whether the persons sought to be charged were the employers of the captain who made the contract or the masters of the persons who were guilty of the negli-

gence; and that the liability does not depend on the title to the ship."

In this case there was no evidence that the captain was appointed by the defendant; and it was shewn that, as far as the title to the vessels was concerned, it was not complete in the defendant until after the goods were supplied.

My brother Gwynne has commented on the facts and the law bearing upon them, and I agree with him that this rule should be made absolute for a nonsuit.

HAGARTY, C. J., concurred.

*Rule absolute.*

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### MILLER ET AL. V. MCCARTHY.

*Costs—Election petition—Counsel fees—Action for.*

On the trial of an election petition against the return of a member to the Local Legislature which resulted in favour of petitioner, to whom the costs were awarded, the defendant was retained by and acted as petitioner's attorney, and M., one of the plaintiffs, a firm of attorneys as well as barristers, acted as petitioner's senior counsel, under an agreement to that effect, with defendant, neither he nor his firm being retained by petitioner. The petitioner's costs were settled by defendant and the respondent's attorney, and defendant received \$1,600, including \$365 counsel fees to M., which M. proved became the property of his firm. The plaintiffs having brought an action against defendant to recover these counsel fees, as money had and received to their use: *Held*, that they could not recover, for that the costs, including these fees, belonged to the petitioner and not to defendant as attorney.

THIS was an action on the common counts, for money had and received, &c.

Plea: never indebted.

The cause was tried before Harrison, C. J., without a jury, at St. Catharines, at the Fall Assizes of 1876.

It appeared that there was a petition against the return of a member to the Local Legislature, which resulted in his being unseated, and ordered to pay the costs. The defendant was the attorney for the petitioner, and one of the

plaintiffs, a firm of attorneys and also barristers, acted as senior counsel for the petitioner.

The defendant and one of the plaintiffs were the only witnesses. The amount of the plaintiffs' counsel fees were proved to be on the usual scale.

A memorandum of Mr. J. Miller's fees was produced. The costs of the petitioner did not appear to have been taxed by the Master, but were settled between the defendant and the respondent's solicitor. On this settlement this memorandum of the plaintiffs' counsel fees was produced, and the defendant received from the opposite party \$1,600 as costs, which included \$365 counsel fees to Mr. J. Miller.

An account was produced of these counsel fees, at the foot of which was written—

“Received payment.”

(Signed) “JAMES A. MILLER.”

Another document was put in, signed by the defendant.

“Received from J. A. Miller an account receipted for counsel fees in the *Rykert and Neelon Case*, which, although receipted, has not been paid.”

The defendant objected to paying this account to the plaintiffs, as the association for prosecuting the petition, of which Mr. J. Miller was president, was indebted to him in a larger amount.

Mr. J. Miller proved that all counsel fees became the property of his firm (the plaintiffs): that he was not employed by the association; but it was agreed between him and the defendant that he would act as counsel.

The defendant proved that he was retained by the association under a letter written to him, signed by J. A. Miller, as chairman of the committee: and that he (defendant) never retained the firm of Miller & Miller.

It was objected that the money received by the defendant was the money of the association, against whom the defendant had a counter claim, and not the money of the plaintiff, whom he had never retained.

A verdict was entered for the plaintiffs for \$365, the amount of the counsel fees claimed.

In this term, November 21st, 1876, *J. K. Kerr*, Q. C., obtained a rule *nisi* to enter a verdict for the defendant under the Law Reform Act, filing affidavits, or for a new trial on discovery of fresh evidence.

During this term, November 30th, 1876, *McCarthy*, Q. C., shewed cause. The old rule that fees paid to counsel are a mere *honorarium* is not the rule in all cases. In *Baldwin v. Montgomery*, 1 U. C. R. 283, it was held that where there was a tariff of fees established by statute, a counsel might maintain an action against his client for the recovery of his fees which had been taxed and paid to the client by the opposite party, and this case was approved of in *Leslie v. Bull*, 22 U. C. R. 518. See also *Re C. K. & C., Solicitors*, 6 P. R. 226. This seems clearly in favour of the plaintiffs. Here there was a tariff of fees, which included fees to counsel, framed under the statute 34 Vic. ch. 3, sec. 39: *Re North Victoria Election Case*, 39 U. C. R. 147. The fees were paid over to the defendant for the use of the plaintiffs, who are therefore entitled to maintain an action against him as for money had and received to their use. As to the fees belonging to the association, they could only so belong on assumption that they had been previously paid by them, which they had not done here. As to the opposite party having paid them over on the faith of their having been paid to the plaintiffs, there is nothing to shew that the opposite party ever considered that they were paid; at all events, it does not lie in the mouth of the defendant to raise this objection.

*J. K. Kerr*, Q. C., contra. The authorities are all clear that to enable counsel fees to be taxed or recovered against the opposite party, they must be previously paid. The plaintiffs here, having given a receipt without payment cannot now maintain an action for them. An action for money had and received will not under any circumstances lie: *Kennedy v. Broun*, 13 C. B. N. S. 677; *Hobart v. Butler*, 9 Ir. C. L. R. 157; *Re Angell*, 6 Jur. N. S. 1373; *Mostyn v. Mostyn*, L. R. 5 Ch. App. 457; *Egan v. Guard-*

*ians of the Kensington Union*, 3 Q. B. 935, note; *Re Hall*, 2 Jur. N. S. 1876; *Morgan & Davey on Costs*, 396; *Roscoe's N. P.*, 13th ed., 554. At all events the fees belong to the client, and not to the attorney. Sec. 44 of the 34 Vic. ch. 3, expressly gives them to the petitioners. In this case the attorney has only been paid a proportion of his bill, and has therefore a lien on the costs for the unpaid balance. In *Baldwin v. Montgomery*, 1 U. C. R. 283, the action was against the client, and not the attorney; but even there the recovery was on the ground of there being an express contract by the client to pay them.

December 28th, 1876. HAGARTY, C. J., delivered the judgment of the Court.

Nothing turns upon the affidavits.

It is not easy to see how the objection can be answered, that the money received by the defendant was received to the use of the clients, and not of the counsel.

It seems hardly necessary to cite authority to prove that costs in actions and legal proceedings, which a litigant party is by law called on to pay to his opponent, are the costs of such opponent, and not of his attorney or legal adviser, whether they be recovered under the name of attorney's fees, fees paid to counsel, sheriff, or other officers, they are wholly and solely the moneys of the client, and not the moneys of the attorney.

They are given as an indemnity to the successful litigant, originally being included in his damages. The subject is discussed in *Pulling on Attorneys*, 3rd ed. 264, *et seq.*

As Sir William Erle says, in *Lloyd v. Mansell*, 22 L. J. N. S. Q. B. 110, at p. 111, "An attorney for a plaintiff is only entitled to receive the amounts recovered in the action, as agent of, and representing the plaintiff."

There the attorney asked the aid of the Court to order a party who had been awarded to pay a small balance and a considerable sum for costs to his insolvent client to pay them to him. This was refused, the Court adding

that it would be like allowing an attorney to bring an action in his own name where the client was the contracting party.

When the defendant received these moneys, they became his client's moneys. If the client gave the attorney money expressly to pay these fees, it may be that an action lies to recover it as money had and received.

In *Re Hall*, 2 Jur. N. S. 1076, on the bankruptcy of a firm of solicitors, counsel was allowed to prove against their estate for fees due to him, which had been actually received by the bankrupts from their clients.

In *Hobart v. Butler*, 9 Ir. C. L. R. 157, the subject is much discussed.

See also *Re Angell*, 6 Jur. N. S. 1373; and the well known case of *Kennedy v. Broun*, 13 C. B. N. S. 677, in which a multitude of cases are collected.

We think there is nothing decided in *Baldwin v. Montgomery*, 1 U. C. R. 283 in favour of an action like the present. It is there said that the counsel could recover *against his own client* money which the latter had received for the plaintiff's counsel fees, taxed and paid to the client by the opposite party.

It is not necessary to discuss that decision by the light of subsequent authorities.

The principle laid down in such cases as *Baron v. Husband*, 4 B. & Ad. 611, seems clearly against the action for money had and received lying.

Money had been paid by the assignees of a bankrupt to the defendant, their solicitor, to pay the plaintiff's costs, he being petitioning creditor and solicitor, and was entitled to costs from the estate, previous to the choice of the assignee.

It was held that this kind of action would not lie, the Court holding that defendant received the money as the agent of his clients, the assignees, and not of the plaintiff, and held it subject to their direction, until he entered into some binding engagement with the plaintiff to hold it to his use.

See also *Cobb v. Becke*, 6 Q. B. 930; 1 *Selwyn's N. P.*, 13th ed., 120.

In the view we take of this case, it seems quite unnecessary to enter into the larger question as to the right of counsel to sue for unpaid counsel fees.

The latest notice of the subject is in the Court of Queen's Bench, *Re North Victoria Election Case*, 39 U. C. R. 147.

The defendant here has to settle with his clients as to all costs received by him from the opposite party, and all questions of set off, &c., can be there discussed.

The rule will be absolute to enter a nonsuit.

*Rule absolute.*

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## RENNIE V. THE NORTHERN RAILWAY COMPANY.

*R. W. Co.—Carriage of goods—Through contract—Agreement—Conditions—Evidence.*

In 1874, the plaintiff, at Toronto, agreed with defendants, to forward all his goods for the season of 1874 *via* the defendants' railway and Lake Superior Line of Steamers to Duluth, and thence to Fort Garry, the defendants to forward the goods from Toronto to Duluth at 75 cents per 100 lbs., and the rate from Duluth to Fort Garry to be \$2.90 per 100 lbs., subject to changes of tariff of the Northern Pacific Railway, and Kitson's line of Red River steamers. The goods in question were shipped by plaintiff under a shipping note, addressed to himself at Fort Garry, "George G. Allen, C. O. D.," subject to the following amongst other conditions:—That when goods are addressed to consignees beyond the places of the Company's stations, they will be forwarded by public carriers or otherwise, as opportunity offered, &c.; but that the delivery by the company will be complete, and their responsibility cease when such carriers have received notice that the company is prepared to deliver to them the goods for further conveyance; and they will not be responsible for any damage or detention, &c., after such notice, or beyond their limits. The goods were carried by defendants to Collingwood, and thence by the Lake Superior steamers to Duluth, where they were delivered to the Northern Pacific R. W. Co., and carried by them and Kitson's steamers to Fort Garry, and there delivered to Allen, but without payment of the price. The plaintiff then made a claim against defendants for such delivery without payment, and so opened his case at the trial, but on its appearing that payment was to be made to the express company, and on the plaintiff stating that his claim was for the delivery without his order or endorsement of the shipping note, his claim was rested on this ground.

*Held*, that plaintiff could not recover, for that defendants' contract was only to carry to Duluth, and on the delivery there to the Northern Pacific R. W. Co., their liability was at an end.

*Semble*, that even if defendants' contract extended to Fort Garry, there would be no liability, for the evidence shewed that it was never intended that the goods should not be given up except on a formal order by the plaintiff or endorsement of the shipping bill.

ACTION for non-delivery or mis-delivery of certain goods. The declaration contained three counts.

First count: For delivering the goods without the plaintiff's order.

Second count: For delivering them to George G. Allen without being paid for them, contrary to the instructions of the plaintiff.

Third count: Trover.

To these the defendants pleaded. 1. Not guilty. 2. *Non assumpsit*. 3. That they were not liable, relying on the condition hereinafter set out.

The cause was tried before Hagarty, C. J., without a jury, at Toronto, at the Fall Assizes of 1876.

It appeared that the plaintiff, a manufacturer of agricultural implements in Toronto, shipped a quantity of goods to Fort Garry during the year 1874. The goods were shipped under shipping notes or receipts, headed as follows:

“Northern Railway of Canada.

“Toronto Station, May 21st, 1874.

“Received from William Rennie the undermentioned property in apparent good order, addressed to

WILLIAM RENNIE, Fort Garry, Manitoba.”

“George G. Allen, C. O. D.

“To be sent by the Northern Railway, subject to their tariff, and on the conditions stated on the other side, agreed to.”

Among these conditions was the 10th, namely, “that all goods addressed to consignees resident beyond the places where the company have stations, and respecting which no directions to the contrary shall have been received at these stations, will be forwarded to their destination by public carrier or otherwise as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them,” &c. “But that the delivery of the goods by the company will be considered as complete, and the responsibility of the company will be considered to have ceased when such carriers shall have received notice that the company is prepared to deliver to them the goods for further conveyance. And the company hereby further give notice that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them if such loss, damage, or detention occur after the said notice or beyond their said limits,” &c.

It appeared also that the plaintiff had made an agreement with the defendants “whereby the said William Rennie agrees to forward all his freight for the season of 1874, from Toronto to Fort Garry, via “The Northern

Railway, Collingwood, and Lake Superior Line of Steamers to Duluth, and thence to Fort Garry, for which the said Northern Railway Company binds itself to forward the said goods from Toronto to Duluth at seventy-five cents (75c.) per 100 lbs., and the rate from Duluth to Fort Garry to be two dollars and ninety cents per 100 lbs., subject to changes of tariff of the Northern Pacific Railway and Kitson's Line of Red River Steamers."

The goods in question were carried by the defendants to Collingwood, and there delivered to the Lake Superior Line of Steamers, which transported them to Duluth, where they were delivered to the Northern Pacific Railway Company, by whom they were handed to the owners of Kitson's line of Red River Steamers, who, on their arrival at Fort Garry, delivered them to George G. Allen. Allen having received the goods and having neglected to pay for them, this action was brought.

The case was originally opened on the second count of the declaration, but upon its appearing that payment was to be made to the Express Company and not to the defendants, and upon the plaintiff, who was examined as a witness, saying, "I never intended the Northern Railway Company to collect; I did not intend them to deliver up the goods until my order was given. I do not pretend the company had anything to do with collecting the money. I complain they gave up the goods without my order," this count was abandoned, and the claim was rested entirely on the delivery to Allen at Fort Garry without the order of the plaintiff.

The learned Chief Justice was of opinion that the defendants were protected by the terms of the shipping note, and found a verdict for them.

In this term November 23rd, 1876, *Bethune*, Q. C., obtained a rule *nisi* under the Law Reform Act to set aside the verdict entered for the defendants, and to enter a verdict for the plaintiff, on the ground that the plaintiff was entitled to recover upon the evidence given at the trial.

During the same term, December, 4th, 1876, *G. D'Arcy Boulton* shewed cause. To entitle the plaintiff to recover, he should have proved that there was a through contract to Fort Garry. Here, by the special agreement between the parties for the season, the freight was only payable to Duluth, and the contract was only to that place. But even if they should be held liable under the agreement, by the 10th condition endorsed on the bill of lading, the liability of the company was restricted to their own line, and their liability ceased so soon as they had handed the goods over to the connecting line at Duluth. In all the cases where there have been similar conditions, the company have been held exempt from liability. The general contract is subject to the special contract entered into in each individual case: *Aldridge v. Great Western R. W. Co.*, 15 C. B. N. S. 582; *Kent v. Midland R. W. Co.*, L. R. 10 Q. B. 1; *Fowles v. Great Western R. W. Co.*, 7 Ex. 699. As to the evidence, the learned Judge having found for the plaintiffs, the Court should not disturb his verdict. The evidence, however, shews that the goods were properly delivered. They were delivered to the person, Allen, whose name appears on the bill of lading as agent, and he signed for them, and the plaintiff's letter subsequently written recognizes him as agent. If, there was a wrong delivery, it was caused by the plaintiff's own contributory negligence, and therefore he cannot now take advantage of it.

*Bethune, Q. C.*, and *A. Galt*, contra. The special agreement is what must govern here, and the proper construction to place upon it is that there was a through freight and through contract to Fort Garry. In all the cases where the plaintiff has been restricted by the condition, the bill of lading was the contract between the parties, and although in *Bristol, &c., R. W. Co. v. Collins*, 7 H. L. Ca. 194, there was a special agreement, it was on the bill of lading and formed part of it, and the conditions being referred to as on the back of the bill of lading, became part of the contract, and not as here, where the agreement

is separate and distinct: *Kent v Midland R. W. Co.*, L. R. 10 Q. B. 1. As to the evidence, Allen was in no way the plaintiff's agent, and his name is put on the bill of lading merely for the purpose of identification, as the plaintiff was sending parcels to other persons at Fort Garry. The plaintiff's letter cannot be treated as a ratification of Allen's authority, as it referred to a prior transaction, and not to this one.

December 28th, 1876. GALT, J.—In the case of *Fowles v. Great Western R. W. Co.*, 7 Ex. 699, which was brought for injury to goods done after they had left the railway of the defendants, the defendants relied on a condition very similar to the one now before us, under which they had received the goods. The words of that condition were, so far as respects this question, "the delivery of the goods by the company will be considered as complete, and the responsibility of the company will be considered to have ceased, when such carriers shall have received the goods for further conveyance." In the present case, the responsibility is to cease "when such carriers shall have received notice that the company is prepared to deliver to them the goods."

In giving judgment, Platt, B., says, at p. 705: "I am of the same opinion. The goods were received by the defendants to be carried upon the terms and conditions mentioned in the receipt note; and it is plain that, by the tenth condition, the company have expressly shielded themselves from all responsibility for the carriage of goods beyond the limits of their stations."

The case of *Kent v. Midland R. W. Co.*, L. R. 10 Q. B. 1, was decided against the company, not because a similar condition would not have protected them, but because they failed to shew that they had delivered the goods in question to the other railway company, by which they were to have been forwarded.

In *Aldridge v. Great Western R. W. Co.*, 15 C. B. N. S. Ex. 582, it was held that the defendants were protected by a condition that the company would not "be liable in

respect of goods destined for places beyond the limits of the company's railway; and, as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier, in the usual course, for further conveyance."

It is manifest from the agreement already quoted, that the plaintiff, at the time when he delivered these goods to the defendants, knew that the company did not undertake to carry them to Fort Garry. What they undertook to do was, to forward the said goods from Toronto to Duluth, at 75c. per 100 lbs., and the rate from Duluth to Fort Garry to be \$2.90 per 100 lbs., subject to changes of tariff of the Northern Pacific Railway and Kitson's Line of Red River Steamers.

I am of opinion, for the reasons already given, that the defendants were not responsible for anything done to the goods after they had been delivered to the Northern Pacific Railway at Duluth. It is unnecessary to consider the question as respects their liability as far as Duluth, arising out of their agreeing for a specific rate to carry the goods to that place, for the injury complained of arose after the arrival of the goods at Fort Garry.

HAGARTY, C. J.—I do not think the defendants responsible for any wrong delivery of the plaintiff's goods at Fort Garry. They did not, in my opinion, become responsible to him therefor. They undertook to carry as far as Duluth at a named rate, and they agreed that the rate from thence to Fort Garry should be a named sum, subject to any change of tariff by the Northern Pacific and the Red River Steamers.

The defendants did not receive or charge any through rate on these goods. When they delivered them to the Northern Pacific Company at Duluth in good order, I think they satisfied their contract with the plaintiff.

In all his negotiations with defendants respecting these goods, he based his complaint on the fact that they were given up to Allen at Red River without payment, and the

case was so opened at the trial. But it appeared that it was with the Express Company, and not with the defendants, that the plaintiff had to deal as to this complaint.

The ground was then shifted to a claim in trover for delivering the goods up without the plaintiff's order or endorsement of the shipping bill or note.

He had no agent at Fort Garry or any one there to act for him, nor did it appear that he had made any arrangement by transmission of the shipping bill or by transmitting any order on which any consignee could get the goods.

Even if I considered the defendants as still liable as carriers up to Fort Garry, I think, as a jurymen, I should still find for the defendants.

Once the charge of giving the goods up without payment of the price is given up, then the whole nature of the dealing between the parties, and the evidence at the trial, raises the strong belief that it never was seriously intended that the goods could not reach the parties named except through a formal order from the plaintiff or endorsement of the shipping bill.

GWYNNE, J., concurred.

*Rule discharged.*

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## MITCHELL V. MITCHELL.

*Insolvency—Composition—Acceptance of—Evidence.*

The defendant, a trader, being in insolvent circumstances, wrote to the plaintiff, a creditor in Scotland, giving him a statement of his account and informing him of his intention to make some arrangement with his creditors, and that plaintiff must rank with the others on his estate which he stated would not pay more than 50c in the \$, to which the plaintiff replied, expressing no dissent; and, again, that he was satisfied if there was no preference given. In the meantime defendant had effected an arrangement with his creditors for a composition of 30c in the \$, on his representation that plaintiff would accept it, without which the whole arrangement would have fallen through, and the defendant must have gone into insolvency. Defendant on the same day, by letter, informed the plaintiff of the arrangement; to which the plaintiff replied without expressing dissatisfaction. Afterwards without dissent he received the instalments of the composition sent to him, and on the receipt of the last instalment he acknowledged it as a payment of "the last instalment of your indebtedness to me."

*Held*, that the plaintiff must be deemed to have accepted the composition with the other creditors, and therefore that he could not sue defendant for the balance.

Remarks as to the form of plea in such a case.

## DECLARATION on the common counts.

There were three pleas, but the only one which it is necessary to consider is the third, which was as follows:—  
 "And for a third plea, upon equitable grounds, the defendant says, that after the incurring of the liability to pay to the plaintiff the sum for which this action is brought, and while the Insolvent Act of 1869 was in full force, the defendant was a trader who then carried on business in the City of Toronto, and became insolvent and unable to pay his debts in full, and his estate became liable to be placed in compulsory liquidation, and defendant then called a meeting of his creditors to be held at the City of Toronto, at which said meeting all the creditors of the defendant, except the plaintiff, attended; and it was then agreed by and between all the creditors of the defendant, except the plaintiff, that they would accept from the defendant a composition of 30 cents in the \$ of their respective claims, in full satisfaction of their said claims, if the plaintiff would also accept the said composition of 30 cents in the \$ in full of his said claim; and the plaintiff, well knowing the

premises, agreed to accept the said sum, and the defendant afterwards paid the said composition to the plaintiff and the said other creditors of the defendant, who accepted the same in full satisfaction and discharge of their said claims."

The cause was tried before Hagarty, C. J., without a jury, at Toronto, at the Fall Assizes of 1876.

It appeared that the defendant in April, 1871, being in a state of insolvency, called a meeting of his creditors.

Mr. *Dobbie*, who was one of them, was examined as a witness. He stated that he remembered a meeting of the creditors being called. "I do not remember the date. I was present at the first meeting, when no arrangement was made. I was represented at the next meeting. I called on Mr. Mitchell when he was in difficulties. He shewed me a statement then. He shewed it to me to-day, and I recognized it. One account was a trust fund, and another was that of a relation." (This was the plaintiff.) "He expressed the opinion that he would come in with the other creditors. That was his opinion. That was the claim of the Rev. James Mitchell. We concluded he would be able to pay 30 cents on the \$, and if we threw the estate into insolvency we would not get so much, perhaps not over 20 cents. The arrangement was made on the assumption that this cousin would come in. We did not expect any preferential claims, except the trust estate, when we gave him a certificate."

On cross-examination he stated:—"His principal creditors were in Toronto. I cannot remember, but I fancy it would be a condition that all were to be paid on the same footing. This is our usual principle in doing business. I am not aware of his shewing any paper from his cousin. My recollection of the conversation was, that he thought his cousin would come in with the rest of the creditors."

The plaintiff, in his examination-in-chief, made no reference to the settlement. All he said with reference to it was, "I was aware there was an insolvent law, and that a majority of creditors could discharge a debtor."

On being recalled he said:—"I always expected he would

pay me in full. Finding nothing coming, I wrote him in 1873 on the subject, and got that letter answered. The letter appeared to me to be rather of an evasive kind, and I was not aware he had made any promises I would enter into the composition with the other creditors. I never was aware of that until to-day. I always expected him to pay me in full from the nature of the debt."

The defendant in his evidence, after stating his circumstances, and shewing that it was necessary for him to make a settlement with his creditors, says:—"I called a meeting of my creditors. They were aware that the plaintiff was a creditor. James Mitchell's claim appeared in the list of my liabilities. They went into my office, and stated themselves what I should pay. That I agreed to,—30 cents on the \$. As a matter of fact I did pay that. I wrote to the plaintiff. I have no copies of the correspondence that took place at that time. He certainly never made any objection. He was out of the country. All the communication I had with him was by letter. I offered to give up everything I had to my creditors. If I did not effect a settlement, I would have been better satisfied to give up everything, and have them release me. Most decidedly I would have required to go into insolvency had a settlement not been effected. This composition of 30 cents was paid, and I was discharged. There was a formal receipt when the last instalment was paid. I had a discharge from my creditors and a letter from Mr. Mitchell to the same effect. I was only made aware he claimed more than 30 cents when this suit was instituted. It was always my intention to pay in full when my circumstances would permit, as a debt of honour, without prejudicing my business. If I am ever in a position I have still the same intention, &c. There were two meetings of creditors. I cannot tell the dates. From letters I judge the 20th April, 1871, was the time of the arrangement with the creditors. I gave them to understand that Mr. Mitchell would go in and accept that composition. He never claimed in full. All he could claim was on the hope I expressed of being sometime able to pay

in full. I may state I never looked upon it as a legal claim. A mere hope I expressed in my letter to him. I have no recollection of asking him distinctly to accept the composition.

There were several letters produced, the material portions of which are set out, as the decision of this case turns very much upon the correspondence between the parties.

On the 6th April, 1871, the defendant wrote the plaintiff that his affairs were in such a state that he must come to an arrangement with his creditors. He says, "I cannot tell yet how much the estate will pay, but at best it cannot be more than 50 cents."

The plaintiff wrote in reply on 19th April, after expressing his regret at the position in which defendant was placed, says, "I hope you will not take things too much to heart. In the statement of account you have sent I notice one error, &c. No credit is given me for interest on that amount for a year and a half, and I should rank on your estate for the interest for that time in addition. I do not, of course, say this with any view to pressing on you, but because the amount is omitted, and most probably I can as ill afford to rank for less than is due as any of your creditors."

Upon the 29th April the plaintiff wrote, apparently in reference to the same letter, "The letter you sent me contains a somewhat meagre statement; at least I would have wished that you had stated whether you had allowed a preference to any of your creditors, as you did on the former occasion. I hope you will let me know as to this on receipt, and if you did, the ground also on which you thought fit to assign the preference to others and not to me, &c. If all have been put on the same footing I say nothing."

Before this letter was written, say on 20th April, 1871, the defendant wrote, "I have to-day made an arrangement with my creditors, who have dealt very liberally with me. I am to pay 30 cents in the \$ within nine months, &c. I will not be able to send you any money for three or four months, but by that time I hope to send you at least the composition on your amount, and I hope to be in a position

to make up to you the full amount of your claim within a year or two."

In reply, on 3rd May, 1871, the plaintiff wrote, "I have yours of the 20th ult. to-day, and am glad to learn that your prospects are so good. You must have had a very great amount of anxiety for many years, and I sincerely trust that you will before long be in more favourable circumstances."

The next letter is from the defendant to the plaintiff, dated 18th January, 1872, "I duly received your letter of the 19th December enclosing statement of account, and although I cannot admit the principle on which you make up the interest to be correct, yet, under the circumstances, I will accept it, and have to express my regret that I am in the position of offering you less than the full amount of my indebtedness to you. Be good enough to let me know whether I will deposit the balance in the Building and Loan Association as before, or send it to you direct."

On the 22nd February, 1872, the defendant again wrote, "I enclose bill of exchange on London for £30 sterling, on account of my indebtedness to you, which will rather more than cover amount of last instalment of composition. This, I am sorry, is all it is at present in my power to do, but, if spared, and should fortune favour me more in the future than it has done in the past, I will pay you the balance in full, but under the most favourable circumstances a considerable time must elapse, as I have it all to make."

On 7th March, 1872, the plaintiff replies: "I received yours yesterday, and beg to thank you for the bank draft enclosed, for £30, in payment of the last instalment of your indebtedness to me. I do not wish you to put yourself to trouble in regard to me in future. It will be time enough for you to think of what you contemplate, when you get into easy circumstances, as I sincerely hope you will yet do."

At the conclusion of the case, the learned Judge entered a verdict for the plaintiff, but without finding any special facts.

In this term, November 22nd, 1876, *Osler* obtained a rule nisi pursuant to the Law Reform Amendment Act, and the Administration of Justice Act, on the ground that the defendant's third plea was proved, and that upon the evidence the verdict should have been given for the defendant; and on the ground that no evidence was given of the defendant's ability to pay the plaintiff's claim, or that his circumstances were such as to permit of his doing so.

During this term, December 1st, 1876, *McMichael*, Q. C., and *Tilt*, shewed cause. The question to be decided is, whether the third plea was proved or not. The plea is, that the other creditors entered into the agreement for the composition with the defendant on the faith of the plaintiff accepting it; but there is no evidence to shew that the plaintiff ever did accept it. The evidence of the parties and the whole tenor of the correspondence shew that it never was intended that the plaintiff should accept the composition in full of his claim, but that he was to be paid in full: *Boyd v. Hind*, 1 H. & N. 938.

*Bethune*, Q.C., contra. The third plea was clearly proved. The evidence shews that the composition was entered into on the faith of all the creditors joining, and when the plaintiff is notified of the agreement, he did not dissent, but accepted the instalments sent him. The moment the plaintiff received the instalment, after notice, he became bound by the agreement. If the plaintiff were now allowed to recover it would be a fraud on the other creditors, as giving him a preference. The expression used in the letters merely profess a hope to be able to pay in full, but do not contain any promise to do so. It was for the benefit of all that the composition should be carried out, for otherwise the creditors would not have got more than 10 cents or at the most 20 cents in the dollar: *Chitty* on Contracts, 10th ed., 43, 692; *Boyd v. Hind*, 1 H. & N. 938; *Good v. Cheesman*, 2 B. & Ad. 328; *Norman v. Thompson*, 4 Ex. 755; *Massey v. Johnson*, 1 Ex. 241; *Kerr* on Frauds 156; *Chasemore v. Turner*, L. R. 10 Q. B. 500; *Maccord v. Osborne*, L. R. 1 C. P. D. 568; *Hart v. Prendergast*, 14 M. & W. 741; *Cockrill v. Sparkes*, 1 H. & C. 699.

December 28th, 1876. GALT, J.—In *Boyd v. Hind*, 1 H. & N. 938, Williams, J., in giving the judgment of the Court of Exchequer Chamber, says, at p. 947: “The law with respect to defences founded on compositions between a debtor and his creditors, appears not to have been distinctly defined until the case of *Good v. Cheesman*, 2 B. & Ad. 328. It used to be sometimes laid down that a right of action once vested could only be barred by a release, or by accord and satisfaction. But since the decision of that case, the law has been regarded as settled, that a composition agreement, by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt, if he accepted the said agreement in satisfaction thereof; and that for such an agreement there is a good consideration to each creditor, viz., the undertaking of the other compounding creditors to give up part of their claim. But no such agreement can operate as a defence, if made merely between the debtor and a single creditor; the other creditors, or some of them, must also join in the agreement with the debtor and with each other, for otherwise it would be a bare contract to accept a less sum in satisfaction of a greater, which would be invalid by reason of want of consideration for relinquishing the residue.”

The question then to be considered is, does the evidence in this case bring the plaintiff within the rule laid down?

It is plain that before any meeting of the creditors of the defendant had been called by him, he had written to the plaintiff that such a step was necessary, and that at the best the estate could not pay more than 50 cents. In reply to this, the plaintiff points out what he considers to be an error in the account sent to him, and says, “I should rank on your estate for the larger amount, and most probably I can as ill afford to rank for less than is due as any of your creditors.” On the 29th April, he writes, “if all have been put on the same footing, I say nothing.” These

letters were written before he had received notice that an arrangement had been made by defendant with his creditors, but on 3rd May he received a letter, dated 20th April, from the defendant, in which he says, "I have to-day made an arrangement with my creditors. I am to pay 30 cents on the dollar. I will not be able to send you any money for three or four months, but by that time I hope to send you at least the composition on your amount." To this letter the plaintiff replies by expressing his satisfaction at the arrangement made by the defendant. Then, when the last instalment becomes due, the defendant writes, "I enclose bill of exchange," &c., "which will rather more than cover amount of last instalment of composition." To which the plaintiff replies, "I received yours yesterday, and beg to thank you for the bank cheque enclosed in payment of the last instalment of your indebtedness to me."

It appears to me to be beyond question that the plaintiff knew the intention of the defendant to make an arrangement with his creditors, and that he stipulated only that no preference should be given, which was carried out : that upon being informed of the terms of the assignment, he expressed his satisfaction ; and lastly, that upon receipt of the bill of exchange for £30, he expressly recognized the composition by acknowledging the draft as payment of the last instalment of the defendant's indebtedness to him.

I am therefore of opinion that the verdict should be for the defendant on the third plea.

We understood on the argument it was not contended by the learned counsel for the plaintiff that he could sustain his case on any ground other than the original liability of the defendant. It is therefore unnecessary to examine the authorities cited as to the question of any promise to pay the debt at a future period.

HAGARTY, C. J.—We may deduce from the evidence : 1. That the plaintiff was aware that the defendant was a trader, subject to the insolvent law, of which he knew the effect :

2. That the defendant was unable to meet his engagements, could not pay in full, and must come to an arrangement with his creditors, paying a composition not exceeding 50c ;

3. That with this knowledge he wrote to the defendant, giving him to understand in substance that he would rank on his estate with his other creditors :

4. That on 20th April, the defendant's creditors met and a composition was agreed to, the defendant representing to the other creditors that the plaintiff would rank with them :

5. That the same day the defendant wrote to the plaintiff informing him of the arrangement made, and the plaintiff in reply expressed no dissent, but by his letter would induce the full belief of assent on his part :

6. That the plaintiff afterwards accepted the composition of 30c. in the \$, and on the last payment thereof being made, the plaintiff stated it to be "the last instalment of the defendant's debt to him" :

7. That defendant made the arrangement with his creditors, and that they accepted such arrangement on the faith of the plaintiff's ranking with them for his claim :

8. That if the plaintiff had refused to rank with the other creditors, it would have defeated the whole arrangement, and forced the debtor into insolvency.

We do not understand any question raised by the plaintiff on the defendant's alleged promise to pay the balance.

The authorities are fully discussed in the notes to *Cum-ber v. Wane*, 1 Sm. L. C., 7th ed., 341.

I think, on this view of the evidence, our judgment must be for the defendant.

GWYNNE, J.—It may be, and perhaps is, strictly true, as urged by Dr. McMichael, that the evidence fails to establish the allegation in the plea, namely, that the defendant's creditors, other than the plaintiff, agreed to the composition conditional only upon the plaintiff's agreeing to accept the rate, and that the plaintiff, knowing that, did agree to

the composition; but it appears to me that this allegation was unnecessary, and perhaps without it the plea would be good, and would be supported by the evidence. But, if necessary, I am of opinion that, under the powers of amendment which we have under the Act for the Administration of Justice, the defendant may, if he wishes, amend his plea *nunc pro tunc*, so as to accord with the evidence. This might be readily done by inserting after the words in the plea, "liable to be placed in compulsory liquidation," the following—of all which the plaintiff and divers other persons, the defendant's creditors, had notice, and it was thereupon mutually agreed by and between the defendant and the plaintiff, and the said other persons, the defendant's creditors, that the defendant should pay to the plaintiff and the said other persons respectively, and that the plaintiff, and the said other persons, the defendant's creditors, respectively, should accept from the defendant, a composition of 30 cents in the \$ on their respective debts, in full satisfaction and discharge of their said respective debts; and the defendant afterwards, in pursuance of the said agreement, paid to the plaintiff, and the plaintiff accepted and received from the defendant the said composition on the said debt of the plaintiff, in full satisfaction and discharge of the said debt now sued upon.

This plea, upon the authority of *Norman v. Thompson*, 4 Ex. 755; *Boyd v. Hind*, 1 H. & N. 938, and the cases cited in *B. & L.*, Præc., 3rd ed., p. 563, where the form of plea is given, would be perfectly good, and would clearly, as it appears to me, be supported by the evidence given in this case. The plaintiff's letters clearly shew, to my mind, that he was concurring in the composition, and that he came into it equally with the defendant's other creditors, and he accepts the composition and gives a receipt in full for it upon this understanding.

The defendant is entitled to judgment, and the rule therefore will be accordingly.

*Rule absolute.*

## CLUXTON V. DICKSON ET AL.

*Shipping—"Dangers of navigation"—Carriers—Exemption—37 Vic. ch. 25, D.*

Under a contract to that effect, the plaintiff, during the month of January, 1875, loaded defendants' vessel, which was frozen in the ice in Port Hope harbour, with a cargo of peas, to be carried in the vessel on the opening of navigation to Kingston or Oswego. While the goods were so on board, the vessel struck a sunken rock, unknown to all parties, at the bottom of the harbour, which broke a hole in the vessel's bottom, causing her to sink and damaging the cargo.

*Held*, assuming the defendants' liability to be that of carriers, that this was a loss caused by the "dangers of navigation," within the meaning of 37 Vic. ch. 25, sec. 1, so as to exempt the defendants from liability.

*Quære*, whether defendants were responsible as carriers, or as warehousemen.

**DECLARATION.** First count: that the plaintiff, at the request of the defendants, delivered to the defendants certain goods of the plaintiff to be by the defendants loaded and stowed on board a ship of the defendants, and carried by the defendants therein from Port Hope to Oswego or Kingston, at the option of the plaintiff, certain perils and casualties only excepted, for freight payable by the plaintiff to the defendants; and the defendants then took and received the goods on the terms and for the purpose aforesaid; yet the defendants so negligently, carelessly, and improperly conducted themselves in and about the said loading and stowage, and in and about the carriage and care of the said goods, that by and through the negligence, carelessness, and improper conduct of the defendants and their servants in that behalf, and not by reason of any of the excepted perils or casualties, the said goods were greatly damaged and deteriorated in value.

Second count: trover.

To this declaration the defendants pleaded not guilty.

The cause was tried before Patterson, J., without a jury, at Cobourg, at the Fall Assizes of 1876.

From the evidence it appeared that the plaintiff made a contract with the defendants to load a certain vessel belonging to them with peas, to be put on board at Port Hope, and on the opening of navigation to be carried in the said vessel to Kingston or Oswego for four cents a

bushel. The loading began on the 4th January, 1875, and continued from time to time until the 4th of February. On the night of the 7th or 8th of February, owing to water having got into the vessel, the peas swelled and the vessel was injured so that she sank. At the time when the peas were being loaded the harbour was full of ice. When the vessel was raised in the spring it was found that a stone, the existence of which in the harbour was unknown to all parties, had made a hole in the bottom of the ship.

The contest at the trial was, whether it was owing to the vessel having settled on the rock, as she was being loaded, that had caused the injury and admitted the water, or whether she had been strained by being upheld by the ice, which, as was alleged, had formed round her sides and prevented her settling down as her cargo was being placed in her.

At the close of the case the learned Judge made a very clear and elaborate review of the evidence, and finally concluded as follows: "On the whole, I am unable to reach any other conclusion than that the vessel was sunk by the stone, and I therefore enter a verdict for the defendants.

In this term, November 28th, 1875, *Hector Cameron, Q. C.*, obtained a rule *nisi* to set aside the verdict entered for the defendants, and to enter a verdict for the plaintiff, pursuant to the Law Reform Amendment Act, on the ground that on the law and evidence the plaintiff was entitled to a verdict, and that the defendants, as ship owners, who had contracted to receive on board their vessel and keep till navigation opened, and then carry to the port of destination, the cargo of peas belonging to the plaintiff, were liable for the loss of or damage to the said cargo from whatever cause the same arose, except from the act of God; or if a danger of navigation be also excepted, then that the loss did not arise from such a danger; and on the ground that if the defendants were only liable for negligence in the care, custody, and loading of the said cargo, the evidence and the weight of evidence shewed such negligence and the defendants' liability.

In this term, December 7th, 1876, *Armour*, Q. C., shewed cause. The defendants occupied the position of warehousemen, and not of carriers, and to render them liable, negligence should have been proved: *Ham v. McPherson*, 6 O. S. 360; *Thirkell v. McPherson*, 1 U. C. R. 318; *Re Webb*, 8 Taunt. 443; *Garside v. Trent Navigation Co.*, 4 T. R. 581; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Coggs v. Bernard*, 1 Sm. L. C., 7th ed., 188. Assuming, however, that they were carriers, then they are exempt under the statute 37 Vic. ch. 25, sec. 1. The evidence shews that the loss occurred by the vessel striking on the sunken stone at the bottom of the harbour, and causing the vessel to fill and sink. The loss, therefore, came within the exception of the dangers of navigation: *Fletcher v. Inglis*, 2 B. & Ad. 315; *Kingsford v. Marshall*, 8 Bing. 458; *Richards v. Gilbert*, 5 Day 415; *Story on Bailments*, 8th ed., sec. 520.

*Robinson*, Q. C., and *Hector Cameron*, Q. C., contra. The defendants occupy the position of carriers, and not of warehousemen. There are no cases that shew that where the goods are received on board the vehicle of carriage they are deemed to be warehoused; but in all the cases the goods have been received into a warehouse itself, as, for instance, where railway companies or forwarders have warehouses in which they deposit the goods before putting them on the train or vessel which is so carry them: *Story on Bailments*, 8th ed., sec. 535-7; *Forward v. Pittard*, 1 T. R. 27. They are, therefore, liable as carriers, and they do not come within the exception, for the loss here was not caused by the dangers of navigation. To come within that exception, it must take place during the course of navigation, that is, the transit must have commenced, while here the transit was not to commence until the spring, *Thompson v. Whitmore*, 3 Taunt. 228; *Laurie v. Douglas*, 15 M. & W. 746; *Abloft on Shipping*, 11th ed., 280, 342; *Parsons on Shipping and Admiralty*, vol. i., 253-8; *Maclachlan on Shipping*, 2nd ed., 501; *Valente v. Gibbs*, 6 C. B. N. S. 270. The evidence here shews that the stone was not the cause of the accident, but the ice opening the seams of the vessel, and causing her to

sink on the stone. The onus is on the defendants to prove the cause of the accident. The following authorities were also referred to: *Hyde v. Trent Navigation Co.*, 5 T. R. 389; *Cairns v. Robbins*, 8 M. & W. 258; *Whitesides v. Russell*, 8 Watts & Serg. 44; *Friend v. Woods*, 6 Grattan 189; *Add. on Contracts*, 7th ed., 615, 731. *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Hodgson v. Malcolm*, 2 B. & P. N. R. 336; *MacLachlan on Shipping*, 2nd ed., 498, and *Smith v. Shepherd*, referred to in the notes: *Angell on Carriers*, 4th ed., 149; *Trent Navigation Co. v. Wood*, 3 Esp. 127, 4 Doug. 287; *Story on Bailments*, 8th ed., sec. 528; *Coggs v. Barnard*, 1 Sm. L. C., 7th ed., 188.

December 28th, 1876. GALT, J.—There were two points insisted on by Mr. Armour: 1. That the defendants should be looked upon, not as carriers, but as warehousemen, and that no negligence was shewn which would render them liable in that character. 2. That the accident was occasioned by the vessel settling down on a rock which was a danger of the navigation, and the defendants were in consequence exonerated by sub-sec. 1 of sec. 1, 37 Vic. ch. 25, D.

On the other side it was contended that the defendants were responsible as carriers, and that the accident arose from a want of care in loading the vessel.

I shall consider the second ground in the first instance, for if the injury was caused by the vessel settling on the rock, and such is a danger of the navigation, it is unnecessary to decide the first.

I have carefully read the evidence and the summary of it prepared by the learned Judge, and I fully concur in the conclusion arrived at by him, namely, that the loss was occasioned by the injury done by the stone.

It is unnecessary to recapitulate the evidence, as I adopt the statement made by the learned Judge, and I wish it to be taken as if repeated by me.

By the 37 Vic. ch. 25, sec. 1, D., carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance, except that they shall not be liable to any extent whatever to make good any loss or damage happen-

ing without their actual fault or privity, or the fault or neglect of their agents, servants or employees: 1. To any goods on board any such vessel, or delivered to them for conveyance therein, by reason of fire or the dangers of navigation.

There was no question made at the trial as to whether the existence of the stone was known. It was proved that that it was not.

In *Fletcher v. Inglis*, 2 B. & Al. 315, a transport in Government service was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was hard and uneven, and on the tide having left her she received damage by taking the ground. Held, that this was a loss by a peril of the sea.

In moving for a new trial Scarlett cited *Thompson v. Whitmore*, 3 Taunt. 227, which was also relied on by Mr. Robinson. But in that case the injury was done when the vessel had been laid down on Gosport beach to be cleaned and caulked; and Mansfield, C. J., held at the trial, and the Court were unanimous, that the direction of the Chief Justice was right, that as the damage happened upon the land, it could not be considered as a loss sustained by the perils of the sea.

In *Kingsford v. Marshall*, 8 Bing. 458, Tindal, C. J., in giving judgment says, at p. 462, "That the injury done to the ship or goods by settling on a hard substance at the bottom of the harbour, would be a damage recoverable on a policy on ship, or a policy on goods not included in the memorandum, as an injury occasioned by the perils of the sea, is beyond all doubt."

This decision has never been questioned.

This description of injury has generally been considered in cases of insurance, and as to whether a vessel has been stranded or not, in disputes arising under the usual memorandum clause in policies of insurance. All the cases are collected in *Corcoran v. Gurney*, 1 E. & B. 456.

In giving judgment in that case Lord Campbell cites and approves of the judgment given by Tindal, C. J., in *Kingsford v. Marshall*.

In *Story* on Bailments, 8th ed., sec. 520, it is said: "If a carrier ship is properly moored in a harbour having a hard, uneven bottom, and on the reflux of the tide, in consequence of a considerable swell, she strikes hard on the bottom, and her knees are injured, and thereby her cargo is damaged, such a loss is to be deemed a loss by the perils of the sea," citing as authority the cases I have mentioned.

In this case the learned Judge found as a fact that the injury was caused to the vessel by the rock, and as such has been shewn by the previous authorities to be a danger of the navigation, I am of opinion that the defendants are within the exception of the statute, and therefore this rule should be discharged.

Having arrived at this conclusion, it is unnecessary to consider the question whether the defendants are entitled to avail themselves of the defence urged by them, that they should be considered as warehousemen and not as common carriers.

It appears to me, however, that if it were necessary for them to rely on that circumstance as furnishing a defence, they might experience some difficulty in sustaining it, owing to the provisions of 37 Vic. ch. 25, which enacts that carriers by water shall be responsible not only for goods received on board their vessels (which was done in this case), but also for goods delivered to them for conveyance by any such vessel.

HAGARTY, C. J.—A full examination of the voluminous evidence satisfies me that the learned Judge arrived at a correct conclusion on the evidence, that the injury to the plaintiff's property was caused by the vessel settling down in loading on a sharp stone at the bottom of the harbour, the existence of which was unknown to the defendants.

On this conclusion he found for the defendants, and rightly, in my judgment.

I think the evidence failed to establish any unseaworthiness or defect in the vessel, or any unskilfulness in management as to the ice, &c.

That the vessel's bottom was actually pierced by the stone sufficient to let in the water was found beyond question—that any other matter caused the injury seems to me only conjecture. The evidence as to the depth of water seems to me to preponderate in favour of the defendants' contention; and to hold the defendants liable would, I think, be to act merely on the supposition that things that might have happened did happen.

As carriers of goods by water, I consider the defendants protected against an injury so sustained, as being caused by a peril or danger of navigation.

It was hardly argued but that injury from an unknown rock at the bottom of a harbour would not be a peril of navigation.

The higher liability sought to be cast on the defendants was that of carriers, and not warehousemen.

Mr. Robinson, as I understood him, ingeniously urged that until the transitus commenced, the protection to the defendants against such dangers would not begin: that while lying in the ice, during the winter, such an accident was not resulting from a danger of navigation.

But I did not understand him as admitting that, until the transit commenced, they held the goods as warehousemen.

I do not see how we can regard the defendants, unless, either as warehousemen with the liabilities of such traders, or as carriers, with the protection given to them.

The very full discussion in the cases in our own courts, *Ham v. McPherson*, 6 O. S. 360, and *Thirkell v. McPherson*, 1 U.C.R. 318, leaves little to be added on the subject of goods held by persons in their warehouses during the winter for the purpose of being carried by them in their vessels on the opening of navigation.

This case presents a new feature—that the vessel intended to carry the grain in the spring is used for storing it during the winter.

It seemed conceded that there is no case exactly in point. The practice is proved to be common in Canadian waters.

In the present case, I consider the evidence shewed that an amount was allowed to the defendants over the ordinary rate of freight for the holding of the plaintiff's grain in their vessel for the months that must elapse before she would be liberated from the ice.

In agreeing so to use the defendants' vessel, as a kind of floating warehouse through the winter, I think the plaintiff must be considered as taking on himself, or at least releasing the defendants from, any liability incurred by dangers of the navigation, or from what would certainly be a danger of navigation if the goods were fairly in transit.

The defendants would be bound to furnish a reasonably staunch and safe floating warehouse.

But I think no higher liability than would attach on them as carriers, to whom goods had been delivered to be carried, was incurred by them.

It is unnecessary to attempt to lay down any more definite rule or line in a case beyond that on which, in my opinion, we are bound by law to declare the defendants not liable.

GWYNNE, J.—When under the peculiar circumstances of this country a carrier by water receives in his ship, while it is fastened in the ice in winter, goods to be carried by him in the ship upon the opening of navigation, whether he is to be considered as holding the goods until the opening of the navigation in the character of a warehouseman only, or as carrier, must, as it seems to me, depend upon the intention and agreement of the parties in each particular case; for although the responsibility of a carrier in respect of goods delivered to him for conveyance attaches upon the delivery of the goods, that cannot deprive the parties of the right to contract that where the goods are placed on board the ship in which they are intended to be carried, some months before in the nature of things the transit can possibly commence, they shall be held in the ship as in a warehouse, and subject only to the responsibility

of a warehouseman; and when nothing is said expressive of the intention of the parties, we must collect their intention by inference from their acts and the usual course of dealing in such cases.

I incline to the opinion that in this case the proper inference to be drawn, in the absence of any express agreement, is, that the defendants received the goods as carriers. The reward contracted for, although one cent per bushel more than the freight which would have been charged had the navigation been open when the goods were received on board, was all agreed for as freight, and consequently if the vessel had been lost after the transit should have actually commenced in the spring, the additional cent could not have been recovered as a charge for warehousing. The whole amount of four cents per bushel being contracted for as freight, could only have been recoverable as such.

Having received the goods then, as I think the defendants must be held to have done, as carriers, their liability attached upon the goods being delivered upon board, that being the time when they were first delivered to them; but, in my judgment, it cannot admit of a doubt that the rights of carriers by water to exemption from liability and their liability are so correlative, that they both must come into existence at the same time.

We cannot, I think, entertain the suggestion that, although the liability attached upon the goods being put on board, the exemptions from liability conferred by the Act respecting carriers by water did not come into existence and would not until the actual commencement of the transit in the spring.

I am of opinion, therefore, that the defendants, during the whole period that the goods were in their vessel while bound in the ice, and until the commencement of the transit, are entitled to claim the same exemption from liability from whatever cause would give them exemption if the transit had actually commenced. If therefore in this case the injury to the vessel arose from the rock, which as appeared in the spring had pierced its bottom, the defen-

dants are exempt from liability as caused by a danger of navigation, equally as if in the course of transit the vessel had run upon such an obstacle, provided that the striking upon such obstacle was without the fault of the defendants or their servants.

The question therefore is resolved into one merely of fact, and this the learned Judge who tried the case without a jury, after a most thorough consideration of the evidence in a carefully prepared judgment, has found in favour of the defendants.

In this finding I entirely concur.

Indeed, the contention of the plaintiff, which was, that the ice stove in the vessel, and that the striking of the vessel upon the rock was a consequence of, and not the cause of the injury, appears to be purely conjectural; and I cannot but think that if this had been the case, there would have been found unmistakable evidence of it, upon the vessel being taken up in the spring.

*Rule discharged.*

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ANDERSON V. THE MUSKOKA MILL AND LUMBER COMPANY

*License to cut timber—Free grant territory—Right to timber after issue of patent—31 Vic. ch. 8, O.*

*Held*, that a license to cut timber on lands comprised in the Free Grant territory, under the Free Grants and Homestead Act of 1868, 31 Vic. ch. 8, O., and located under that Act, does not enable the licensee to cut timber after the issue of the patent, although during the currency of the license year.

DECLARATION.—First count: trespass to goods.

Second count: trespass *quare clausum fregit*. Pleas.

To first count: not guilty, and not possessed. To second count: not guilty, and that the land was not the plaintiff's.

Issue.

The cause was tried before Hagarty, C. J., without a jury, at Barrie at the Fall Assizes of 1876.

The whole question was, whether or not the defendants, who were licensees to cut timber under a license issued on the 3rd of June, 1875, had a right to cut timber under that license upon the lands patented to the plaintiff by letters patent, issued the 24th of December, 1875, under the Free Grants and Homestead Act of 1868, after the issue of such letters patent, &c.

The learned Chief Justice entered a verdict for the defendants.

In this term *Lount*, Q. C., obtained a rule *nisi* to set aside the verdict and to enter a verdict for the plaintiff.

In the same term *McCarthy*, Q. C., shewed cause. Under the Free Grant and Homestead Act, 31 Vic. ch. 8, O, not only must there be five years' location, but the settlement duties must be performed; and there is no evidence here that they were performed. The Act 31 Vic. ch. 8 must be read in connection with the Consol. Stat. U. C. ch. 23, which enables the issue of licenses from year to year, and where the patent issues during the year for which the lease is issued, the licensee is entitled to the timber cut during the currency of his license: *Contois v. Bonfield*, 25 C. P. 39.

*Lount, Q. C., contra.* The Act, 31 Vic. ch. 8, O, must be alone looked at, and the rights of the parties are governed by that Act. Under the 10th section the timber remains in the Crown until the patent issues, but on the issuing of the patent it vests absolutely in the patentee, and cannot be controlled by an existing license. The object was to prevent the locatee cutting the timber during the currency of the five years. In the patent issued here, the only restriction was, as to the minerals. The Consol. Stat. ch. 23 merely applies to the other ungranted lands of the Crown, and not the free grant lands. The absence in the present Act of the provision in the former Free Grant Act, 3 Vic. ch. 2, giving effect to the license to cut timber, shews that the Legislature did not intend that such right should now exist. The 37 Vic. ch. 23., O., which gave power to locatees located before 1871, to sell and dispose of the timber, also shews that free grant lands were not to be effected by timber licenses. The Crown having authorized the issue of the patent, no force can now be given to the objection that the settlement duties were not performed, for it would amount to a rescission of the patent : *Barnes v. Boomer*, 10 Grant 582 ; *Mahon v. McLean*, 13 Grant 361 ; *Kennedy v. Lawlor*, 14 Grant 254 ; *Casselman v. Hersey*, 32 U. C. R. 333. The case of *Contois v. Bonfield*, 25 C. P. 39, does not apply here, as it referred to the other Crown lands and not to the free grant lands.

GWYNNE, J., delivered the judgment of the Court.

The point involved is, whether or not licenses granted over the free grant territory, described in 31 Vic. ch. 8, O., are to be held to have the same effect as in *Contois v. Bonfield*, 25 C. P. 39, the Court held them to have in the case of lands granted in other parts than in the free grant territory, after the issuing of the letters patent—namely, that a license granted in the year in which letters patent issue, but before the issue of the letters patent, is operative and valid as against the letters patent, after the issue thereof until the expiration of the then current license year.

The point involved in the case turns upon the construction to be put upon several statutes.

By the Public Lands Act, 22 Vic. ch. 23, A.D. 1859, Consolidated Statutes of Canada, timber licenses granted under that Act operated upon all the ungranted lands of the Crown, and were declared to be valid for a period of not longer than twelve months from the date thereof, respectively. The operation and effect of the grant of license was declared to be, to confer on the licensee the right to take and to keep exclusive possession of the lands described in the license, subject to such regulations as should be established by order in Council, and to vest in the holders of the license all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the license during its term, and also to vest in the holders of the license the right to institute any action or suit at law or equity against trespassers. And it was provided, that all proceedings pending at the expiration of any such license might be continued to final termination as if the license had not expired.

A license granted under this Act had, as we think, and still has, unless subsequent Acts make a difference, operation and validity until the full expiration of its term by effluxion of time upon all the ungranted lands of the Crown, to the same extent as if letters patent under the great seal of the Province had been granted conferring the same estate, powers, and privileges; and that therefore a license to cut timber under the Act during the year of its continuance in force, must take precedence of letters patent subsequently to the granting of the license, but before the expiration thereof, granting the lands comprised in the license to another person.

The Act 23 Vic. ch. 2, respecting the sale and management of the public lands, repeals 22 Vic. ch. 22 of the Consolidated Statutes of Canada, and makes provision for the sale and management of the public lands in many respects identical with the provisions of 22 Vic. ch. 22.

The Act 23 Vic. ch. 2, is an amendment by a substitutional enactment of the former Act.

By sec. 13 of 23 Vic. ch. 2, it is enacted that the Governor in Council might appropriate any public lands as free grants to actual settlers upon or in the vicinity of any public roads, opened through the said lands, in any new settlements, under such regulations as should from time to time be made by order in Council.

By the 16th section it was enacted that the Commissioner of Crown Lands might issue under his hand and seal to, (among other persons), any person who is permitted to occupy, or who has been received or located upon any public land as a free grant, an instrument in the form of a license of occupation; and it was provided that such person might take and occupy the land therein comprised, subject to the conditions of such license, and might thereunder maintain suits in law or equity, against any wrongdoer or trespasser, as effectually as he could do under a patent from the Crown; and that such license of occupation, should be *prima facie* evidence for the purpose of possession by such person, but that the same should have no force against a license to cut timber existing at the time of the granting thereof.

The intention of the Legislature, as here expressed, would appear to have been to exempt all lands for which licenses of occupation should be granted, whether upon any actual sale or upon a free grant location, from the operation of the Act authorizing licenses to be granted for cutting timber after the expiration of the year in any timber license current at the time of the grant of the license of occupation; putting grantees of these licenses of occupation, as respects licenses to cut timber, upon the same footing as letters patent granting the land to a purchaser or as a free grant.

The localities within which licenses of occupation or letters patent as free grants could be issued being, under this Act, very limited, the Ontario Act, 31 Vic. ch. 8, called "The Free Grants and Homestead Act of 1868," was passed. It repealed the 13th section of the above recited Act of 1860, except that it provided that letters patent might issue for all lands theretofore located as free grants under

that 13th section, as if the Act of 1868 had not been passed; and for the future, in lieu of the 13th section of the Act of 1860, it brought a very extensive territory within the operation of the provisions which the Act established for the future regulation of free grants.

The 6th section enacted that every person to whom any land should in future be allotted, under such regulations as should from time to time be made by order in council for a free grant thereof, should be considered as located for said land within the meaning of the Act.

The object of the Act plainly was to promote the settlement of the country by holding out inducements to persons to settle upon the lands in these remote parts to which the power of the government to make free grants was confined.

By the 10th section it was provided that all pine trees growing or being upon any land so located, should be considered as reserved from said location, and should be the property of her Majesty, *except* that the locatee might cut and use such trees as might be necessary for the purposes of building, fencing, and fuel on the land so located, and might also cut *and dispose of* all trees required to be removed in actually clearing said land for cultivation; but, with the exception of necessary building, fencing, and fuel, that no pine trees should be cut outside the limit of such actual clearing *before* the issuing of the patent, and that all pine trees cut and disposed of within the limits of actual clearing, except those used for necessary building, fencing, and fuel, should be subject to the same dues as were at the time payable by the holders of licenses to cut timber or saw logs; but that "*all trees remaining on the land at the time the patent issues shall pass to the patentee.*"

This Act made a very material difference, as it appears to us, in the position of locatees upon free grant lands from that in which those located under 23 Vic. ch. 2, were. Under section 16 of the latter Act it would seem to have been intended that no license to cut timber in force at the time of the issuing the license of occupation should be re-

newed, after the expiration of the then current license year, to the prejudice of the license of occupation, whereas the Act of 1868 plainly expresses the intention to reserve the pine trees as the property of Her Majesty, until the issuing of letters patent, granting the land to the locatee, upon the occurrence of which event the 10th section of the Act of 1868 expressly says that all trees then remaining on the land shall pass to the patentee. This expression, as it seems to me, after the issuing of letters patent granting the land to the locatee, controls the operation of the Consol. Stat. C., 22 Vic. ch. 23, sec. 2, as respects the operation of a license to cut timber upon lands located as free grant lands under the Act of 1868,

The 4th section of the Act of 1868 having enacted that the lands brought within its operation should be located under such regulations as should from time to time be made by order in council, *not inconsistent with the provisions of the Act*, certain regulations appear to have been established by orders in council on the 27th May, 1869. What those regulations were does not appear, but that they were made appears from the license to cut timber, filed in this case, and upon which the defendants rely. That license, bearing date the third day of June, 1875, professes to give to the defendants power and license to cut every description of timber and saw-logs on unlocated or unsold lands or lots, *and all pine trees* on lots sold or located under the orders in council of 27th May, 1869, upon the location described on the back of the license, to hold and occupy such location to the exclusion of all others, except as in the license mentioned, from the 30th June, 1875, to 30th April, 1876. Attached to the license is a list informing the licensee of all lots which had then been located under the Act, intituled, "List included in this license which are sold or located, with date of sale or location."

In this list are set down the lands subsequently granted to the plaintiff by letters patent, dated the 24th December, 1875, as having been located upon the 2nd day of August, 1870. The defendants, therefore, at the time of their receiv-

ing this license, had notice that there was a locatee placed upon the land in question, who, in the event of settlement duties required by the Act being performed, would, under the 9th section of the Act, be entitled to receive letters patent granting the lands to him after the 2nd day of August, 1875.

The learned counsel for the plaintiff has referred also to 37 Vic. ch. 23, O. That Act recites an order in Council made on the 4th day of October, 1871, giving public notice that the Department of Crown Lands would recognize the rights of all purchasers or locatees of free grant lands in townships open for sale and location under the Free Grant and Homestead Act of 1868, in the Districts of Muskoka and Parry Sound, who should have so purchased or located any lot in the said township on or before the 30th day of September, 1871, and who should on that day be in the actual occupation of, and resident on the lots located, to sell or dispose of all pine trees standing or being on the lots located or purchased, and occupied by them, subject to the payment to the Crown of certain duties set forth in the said orders. And the Act declared that the said order in Council should thereafter be held to have conferred upon any locatee or purchaser coming within the terms thereof, a valid and sufficient authority to sell and dispose of any pine trees standing or being upon the lots located, subject however to the payment of duties imposed by the said order.

The object of this Act seems certainly to be to place locatees upon these lands in a still more favourable light than they were by the Act of 1868, for it gives to all locatees coming within its provisions a power to sell and dispose of, before the issuing of letters patent, those trees which the Act of 1868 had declared should be the property of Her Majesty until the issuing of the letters patent.

The Act serves then, as it seems to me, as a strong legislative declaration that the intention of the Act of 1868, as well as of 27 Vic. ch. 23, was to qualify and restrain the power of the Commissioner of Crown Lands to grant licenses to cut

timber upon lands located under the Act of 1868. Referring to the letters patent to the plaintiff, we find that the lands located by him on the 2nd of August, 1870, were granted free from any reservation of any pine trees. The letters patent, as the Act of 1868 requires, states that they are granted under the "Free Grants and Homestead Act of 1868," which in express terms reserves the pine trees after the issuing of the license of occupation as the property of Her Majesty only until the issuing of letters patent granting, *when*, as the Act declares, all pine trees remaining shall pass to the patentee. I am clearly of opinion, therefore, that the defendants took this license with notice in law and in fact that the lands in question were located upon the 2nd of August, 1870, under the Act of 1868, and that upon the issuing of letters patent to the locatee he would *eo instanti* become seized of all the pine trees growing on the lot. I am therefore of opinion that the plaintiff is entitled to recover from the defendants for all the pine trees cut by them since the issuing of the letters patent to the plaintiff, and that the observations relied upon in *Contois v. Bonfield* do not apply in the case of lands located under the Act of 1868. And the order of reference agreed upon at *nisi prius* will be carried out.

*Rule absolute.*

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## MACKENZIE V. DAVIDSON.

*Insolvency—Sale of goods—Validity—Trover—Estoppel in pais—Equitable plea.*

To an action of trover by plaintiff as assignee in insolvency of H.; the first count alleging a conversion previous to, and the second count a like conversion subsequent to, H.'s insolvency, to which the common counts were added, the defendant pleaded, on equitable grounds, that H. purported to sell and convey to F. & C. all his stock-in-trade, and executed legal transfers thereof, and represented that he had so sold the same, whereby certain of his creditors were induced to accept F. & C.'s notes, given, as he alleged, for the purchase money, and to extend the time for the payment of H.'s indebtedness to them, and whereby also other persons were induced to supply F. & C. with goods on credit: that F. & C. were placed in insolvency by compulsory liquidation, and that such creditors and other persons were the creditors who filed claims against F. & C.'s estate: that defendant was appointed assignee, and as such took possession of the goods in F. & C.'s store, consisting of those received from H., as well as goods subsequently supplied to F. & C. as aforesaid, as also of the books used by F. & C., and now claimed by plaintiff: that the goods and book debts as above will not more than pay F. & C.'s creditors: that even if said goods and books were H.'s, he and his assignee are estopped from setting up any claim thereto as against defendant or to the prejudice of F. & C.'s creditors, who through defendant have a lien in equity upon said goods for the amounts respectively due them as aforesaid; and defendant prays that an account may be taken, and defendant declared a trustee for the amount found to be due to the said creditors.

*Held*, by GWYNNE, J., and affirmed by the full Court, plea bad, for as to the goods alleged to be F. & C.'s, they could not be H.'s, of whom plaintiff was assignee; and as to the other goods, the plea averred a sale impeachable by the assignee, and probably in itself an act of bankruptcy; and the matters set up shewed no estoppel in pais.

*Per* GWYNNE, J. The statute authorizing equitable defences, does not authorize pleading matters which are merely evidence under a legal plea.

DECLARATION by the plaintiff as assignee of the estate and effects of one Hawkins, under the Insolvent Act of 1875. The first count was in trover for the conversion of certain goods by defendant before Hawkins's insolvency. The second count was also in trover, for a like conversion after Hawkins's insolvency. The common counts were added.

Fifth plea to the whole declaration, on equitable grounds: that the said Hawkins purported to sell and convey to James I. Fields and Andrew Caldwell, carrying on business under the style and firm of Fields & Caldwell, all the stock-

in-trade connected with his business as a general merchant at the village of Cumminsville, in the county of Halton, and executed legal transfers thereof, and represented that he had so sold the same, and thereby induced certain creditors of his own to accept promissory notes made by the said Fields & Caldwell, given, as he alleged, on account of the purchase of the said stock, and thereby obtained an extended time for payment of the amounts due by him to the said creditors; and further, by the said representations induced a large number of persons to supply the said firm of Fields & Caldwell with goods upon credit; and the said creditors, who so took the said notes of the said firm and who supplied the said goods, are creditors of the estate of the said Fields & Caldwell, against whom an attachment issued under the Insolvent Act of 1875, and the assignee of whose estate and effects under the said Act the defendant is. And the defendant says that he took possession, as such assignee, of the goods in the said store occupied by the said Fields & Caldwell, which included in part the balance of the goods purchased or received by them from the said Hawkins, and in part new goods purchased by them on credit on their own account, while carrying on business in their own name, which they did for several months after the transfer, and which are the goods claimed herein, and the said books so taken by the defendant were the books kept by them while they carried on business in their own name, and which are the books claimed herein. And defendant says, that the said goods so taken by him, as also the amount which can be collected from the said books, will not more than pay the claims of creditors who have filed against the said estate in respect of notes received from the said Hawkins, upon the representations aforesaid, and in respect of new goods furnished to them while they carried on business by persons dealing with them (as the said Hawkins represented and knew) as the owners of the said stock and business. And the defendant submits that, even if the said goods and books were the goods and books of the said Hawkins, he and his assignee are estopped from setting up

any claim thereto as against the defendant or to the prejudice of the said creditors, and that the said creditors have through the defendant a lien upon the said goods in equity for the amounts respectively due to them for supplies of new goods, and in respect of notes of the said firm so accepted upon the representations so made that the said firm were the owners of the said stock, business. and books. And the defendant prays that an account may be taken of the amounts to which the said several creditors are entitled, as aforesaid, and that he may be declared to be a trustee in respect of the proceeds of the said goods and books for them to the extent of the amount so found.

To this plea the plaintiff demurred, on the grounds:—

1. That it appears on the face of the plea that there are creditors of Hawkins to whom no representations of any kind were made in regard to the alleged sale to Fields & Caldwell, and if the relief prayed for by the defendant were granted then the creditors of Hawkins would be divided into two classes, one of whom, though holding no mortgage or lien on Fields & Caldwell's goods, would yet receive (to the exclusion of the other class,) the whole proceeds of the goods alleged to have been sold to Fields & Caldwell, it appearing on the face of the plea that such sale was in fact not *bona fide* and a mere fraud on Hawkins's creditors.

2. That the relief prayed for would introduce a mode of distribution of the assets of the insolvent Hawkins, and create preference between the creditors of his estate, contrary to the force of the Insolvent Acts.

3. That the plea is contradictory and inconsistent, and states the effect of the declaration, and the plea does not in express terms state whether the alleged sale to Fields & Caldwell is or is not good in law. The declaration expressly claims only the goods of Hawkins, and the other pleas of the defendant are sufficient to protect the defendant against any claim to the property of Fields & Caldwell, if such claim were made in the declaration.

2. That the plea confesses the cause of action without avoiding the same.

On August 31st, 1876, the case was argued.

*Edward Martin*, Q. C., for the plaintiff.

*Gibbons* for the defendant.

The argument was the same as before the full Court, reported below.

September 9th, 1876. GWYNNE, J.—The defendant, by way of defence upon equitable grounds, pleads to an action of trover brought by the assignee of an insolvent, as to part of the goods, matter which the defendant relies upon as constituting a good estoppel in *pais*, and so matter which could be given in evidence, if a defence, upon issues joined on the ordinary legal pleas in trover, namely, not guilty, and denying property in the plaintiff; and as to other goods, matter relied upon as shewing that the goods, as to which this matter is pleaded, are the goods of a firm named Fields & Caldwell, of whom the defendant is assignee, and not the goods at all of Hawkins, the insolvent of whom the plaintiff is assignee.

This plea is demurred to, and I think the demurrer must be allowed.

The statute authorizing the pleading of defences upon equitable grounds, never contemplated the authorizing pleading matters which are merely evidence under a legal plea.

Thus, where a defendant would be entitled to relief in equity against a judgment obtained at law against all such defences as could be urged at law, he may plead the facts which would entitle him to such relief.

A plea may, it is true, as was urged before me, constitute a good legal plea, although pleaded by way of defence upon equitable grounds, and it was urged that all that can be said of this plea is, that, although pleaded upon equitable grounds, it constitutes a legal plea—objectionable only as amounting to not guilty, or that the plaintiff was not possessed as of his own property.

Although a plea pleaded by way of equitable defence may be a good legal plea offering a legal defence, yet a plea,

pleaded by way of equitable defence, shewing no equitable grounds, and a bad plea at law as pleading only matters of evidence, can, in my judgment, upon no principle be upheld; and whether it be objected to by motion to strike it off the files, or by demurrer, should it be allowed to remain upon the record. See judgment of Martin, B., in *Wood v. Dwarries*, 11 Ex. 505 (a).

This plea, however, is, in my judgment, clearly bad, because, as to the goods alleged to be the goods of Fields & Caldwell as purchased by them, they cannot be the goods of Hawkins, the insolvent, whose assignee the plaintiff is; and as to the residue, the matters pleaded do not shew a perfect estoppel in *pais*; for consistently with what is stated in the plea, the *sale* which it is there said Hawkins *purported* to make to Fields & Caldwell might not have been a good sale at all, but may have been in itself the Act of Insolvency in virtue of which Hawkins became an insolvent, and the plaintiff his assignee, and may be wholly void.

Mr. Gibbons contended that the plaintiff should have replied any matter, if there be any such, to defeat the transaction between Hawkins and Fields & Caldwell. But this is arguing in a circle, for there is no occasion for a replication unless the plea be good; and the question is, is it so good as to require a replication? It is not good, if, consistently with matter not displaced by the plea, the transaction may be an act of insolvency, and void by statute.

If the defendant has a good defence of the nature he suggests, or of any other nature, he can have full benefit of it under the ordinary pleas in trover, and he can suffer no prejudice by my pronouncing, as I do, upon this demurrer judgment in favor of the plaintiff.

*Judgment for plaintiff.*

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(a) See also *Shier v. Shier*, 22 C. P. 147, at p. 152.

From this judgment the defendant appealed to the full Court.

During this term, November 26th, 1876, the demurrer was argued.

*E. Martin*, Q. C., and *Ferguson*, Q. C., for the plaintiff. As to part of the goods, no claim is made to them in the declaration; at all events the title could be raised under the plea of "not possessed." As to the other goods, the defendant's title can be sustained only on his shewing a valid sale; whereas the plea does not allege a sale at all, but merely that Hawkins purported to sell—all it amounts to is a colourable transfer. Also, it attempts to divide the creditors into classes, as opposed to the Insolvent Act as amounting to a preference; *Trueman v. Davis*, 11 Grant 446; *Dutton v. Morrison*, 17 Ves. 193; Insolvent Act 1875, secs. 80, 82, 83.

*McMichael*, Q. C., and *Gibbons*, contra. As to the new goods, the plaintiff does claim them, and even if the defendant's title could be shewn under the plea of "not possessed" it does not prevent the defendant from setting out the facts on which he relies. As to the other goods, the intention of Hawkins was to make a valid sale to Fields and Caldwell, and the plea alleges this, and that until attacked it is good. It then goes to say, that even if the sale is *prima facie* voidable, the special circumstance alleged estop the plaintiff from denying its validity. The plea amounts to an estoppel *in pais*: *Sanderson v. Collman*, 4 M. & G. 209.

December 28th, 1876. HAGARTY, C. J., delivered the judgment of the Court.

I feel the greatest difficulty in clearly understanding the meaning of this plea. I presume it must be my own fault, as the learned counsel for the defendant on the argument insisted on its lucidity.

We asked whether it meant that the sale made by Hawkins was or was not set up as a good transfer against his assignee, but this the counsel would not distinctly admit.

We think we must read it as averring a sale impeachable by the assignee, and most probably in itself an act of insolvency.

In that view, we think it is certainly bad.

The best that can be said of it seems to be, that it pleads certain matters which ought to amount to an estoppel *in pais* on the plaintiff.

But assuming that Hawkins made a transfer of his stock in trade, which does not bind his assignee who represents his creditors, can we hold the statements in the plea to be a legal or equitable bar? That he gave the notes of F. & C., given for the stock to his own creditors, seems hardly a matter to bar his assignee, or to be urged by the assignee of F. & C.; and so as to the other statements.

The taking of negotiable notes in payment of goods sold in fraud of the insolvent laws, and outstanding in the hands of innocent holders, may be a circumstance to be urged in trying to maintain the goodness of the impeached sale, but cannot be urged simply as a bar in itself.

We can hardly see any defence open to the defendant suggested by this plea, which could not be equally available under not guilty, and not possessed, or not the goods of the plaintiff.

We do not decide against the plea as amounting to a general issue. But giving it the only construction which makes it intelligible to our mind, we think it admits the plaintiff's *prima facie* right, and then seeks to avoid it by matter insufficient as a bar to such right.

*Judgment for plaintiff.*

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## MCLEAN V. HIME.

*Executor—Right to pledge personal securities—Detinue—Evidence.*

In detinue for a mortgage, it appeared that the plaintiff and his father were executors and trustees under the will of one C., the plaintiff being also residuary legatee; and that in April, 1864, the plaintiff, who was then residing in England, having written his brother to send him some money, the brother, who had access to or possession of the mortgage as agent of the father, since deceased, procured a loan for the plaintiff from the defendant of £25 stg., on his depositing the mortgage with defendant as collateral security, not only for this amount, but for a further sum of \$279, previously obtained by the brother, and then due, shewing defendant C.'s will, and promising to notify plaintiff of the deposit and obtain his consent thereto. The plaintiff was so notified but did not repudiate the transaction, either prior to his return to Canada, in 1867, or until the autumn of 1875, when he served the plaintiff with a demand, and in May, 1876, commenced this action.

*Held*, that the plaintiff could not recover, for under the circumstances he must be assumed to have authorized the deposit, which he, as executor and residuary legatee, had power to make.

HAGARTY, C. J., *hesitante*, as to the defendant's right to retain for the brother's debt.

THIS was an action of detinue for the alleged detention by the defendant of a certain indenture of mortgage (particularly described in the declaration), the property of the late John Dougald Cameron, deceased, and to which the plaintiff, as surviving executor of the last will and testament of the said John Dougald Cameron deceased, was entitled.

To this declaration the defendant, among other pleas pleaded, for a fifth plea: that before the alleged detention, the plaintiff, through his agent, one Thomas Alexander McLean, deposited the said indenture of mortgage with the defendant, to be by him kept as a pledge and security for, and until the repayment by the plaintiff of, the sum of \$401, then lent by the defendant to the plaintiff, as such executor, upon the security of the said indenture of mortgage, and the defendant had and received the same for the purpose and on the terms aforesaid, and at the time of the alleged detention, the said sum of \$401 was, and still is due and unpaid to the defendant, wherefore the defendant detained, and still detains the said indenture of mortgage, which is the alleged detention.

Upon this plea issue was joined.

The cause was tried before Harrison, C. J., without a jury, at Toronto, at the Spring Assizes of 1876.

The facts, so far as material, are set out in the judgment.

The learned Chief Justice entered a verdict for the defendant upon the issue joined upon the fifth plea, and for the plaintiff upon all the other issues.

In Trinity term, September 2nd, 1876, *A. G. McLean* obtained a rule *nisi* to set aside the verdict entered for the defendant upon the above plea, and to enter a verdict for the plaintiff, under the Law Reform Act.

In this same term, November 24th, 1876, *Delamere* shewed cause. The only question is that arising under the fifth plea. The plaintiff as executor, in the absence of fraud or collusion, had an absolute right to pledge the mortgage even for his private debt. The defendant was not bound to see whether there was a breach of trust or not. It must be assumed on the evidence that the brother had authority to make the pledge. Even assuming he had not, the plaintiff's subsequent conduct in allowing it to remain unchallenged for so many years, amounted to a ratification. If the Court should be of opinion that the pledge for the brother's private debt was unauthorized, the defendant is clearly entitled to hold it for the £25 stg. advanced to the plaintiff, the plaintiff being not only executor, but residuary devisee.

*M. C. Cameron*, Q. C., contra. It is not disputed that all over the £25 stg. was advanced to the brother for his private debt, and before the pledge was made. There can, therefore, be no lien for this. There is also no lien for the £25 stg., as it was a personal advance to the plaintiff, and not for the benefit of the estate, and the executor has no authority to pledge the securities for his personal debt. But even if there was such authority, the pledge was for an entire sum, and there is no power to separate the legal from the illegal portion. The defendant had no claim at law, as the legal estate did not pass to him, and it could only

arise in equity, but even in equity there can be no lien, for the pledge was a breach of trust, to which the defendant was a party. There was, however, nothing to shew that the plaintiff ever authorized his brother to make the deposit; and the brother states that he never had authority. There was no implied ratification, as the brother further states that he never informed the plaintiff of the pledge, and the plaintiff did not in fact become aware of it until just before making the demand: *Williams on Executors*, 7th ed., vol. i., p. 643; vol. ii., p. 932, and the cases there referred to. The pledge also was only made as collateral security for a note given by the brother, and defendant by renewing the note did away with the pledge: *Colwell v. Simpson*, 16 Ves. 273.

December 28th, 1876. GWYNNE, J.—It is a general rule, both of law and equity, that an executor has an absolute power of disposition over the whole personal estate of his testator. To which rule the only exception is stated by *Williams on Executors*, 7th ed., vol. ii. p. 935, to be, where collusion exists between the purchaser or mortgagee and the executor.

In *Nugent v. Gifford*, 1 Atk. 462, Lord Hardwicke said, at p. 463: "At law the executor has a power to dispose of, and alien the assets of the testator, and when they are aliened, no creditor by law can follow them. \* \* This Court," (of Chancery,) "will indeed follow assets upon voluntary alienations by collusion of the executor; but if the alienation is for a valuable consideration, unless fraud is proved, this court suffers it as well as at law."

In *Hill v. Simpson*, 7 Ves. 152, at p. 165, Sir William Grant, reviewing the cases, refers to *Nugent v. Gifford*; *Mead v. Lord Orrery*, 3 Atk. 235, and *Whale v. Booth*, 4 T. R. 625 note, as establishing the absolute right of the executor to bind the assets by any disposition; and to *Humble v. Bill*, 2 Vern. 444; *Crane v. Drake*, 2 Vern. 615; *Farr v. Newman*, 4 T. R. 621; *Bonney v. Ridgard*, 1 Cox 145; and *Andrew v. Wrigley*, 4 Bro. C. C. 124, as shewing that there are limits to the rule.

These decisions, though difficult to be reconciled, did not appear to Sir William Grant to be inconsistent, and he reconciles them in this manner : He says at p. 165, "It is true, that executors are in equity mere trustees for the performance of the will ; yet in many respects and for many purposes, third persons are entitled to consider them absolute owners. The mere circumstance, that they are executors, will not vitiate any transaction with them ; for the power of disposition is generally incident ; being frequently necessary ; and a stranger shall not be put to examine, whether in the particular instance that power has been discreetly exercised. But from the proposition, that a third person is not bound to look to the trust in every respect and for every purpose, does it follow, that in dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character as trustee ; when he knows, the executor is applying the assets to a purpose wholly foreign to his trust."

And again, he says, at p. 168 : "Though it may be dangerous at all to restrain the power of purchasing from him," (the executor), "what inconvenience can there be in holding, that the assets, known to be such, should not be applied in any case for the executor's debt, unless the creditor could be first satisfied of his right ? It may be essential that the executor should have the power to sell the assets : but it is not essential that he should have the power to pay his own creditor ; and it is not just that one man's property should be applied to the payment of another man's debt."

In *Hill v. Simpson*, therefore, a transaction whereby an executor pledged the assets of his testator as security for his own debt, was set aside at the instance of pecuniary legatees.

In *Taylor v. Hawkins*, 8 Ves. 209, a leasehold specially bequeathed to an executor was by him assigned as a security for his own debt, and the assignment, in the absence of collusion, was sustained against a creditor seeking to set it aside.

In *McLeod v. Drummond*, 14 Ves. 353, a pledge by some

executors of bonds to the testator, was sustained as against a bill filed by co-executors.

Sir William Grant there, in giving judgment, dismissing the bill, says, at p. 363: "There is no case approaching the present in its circumstances, in which the party, dealing with the executor, has been deprived of the benefit either of an assignment or a pledge; and there is no principle upon which the Court can deprive these defendants of the benefit of this pledge without holding broadly and generally, that no man can advance money upon a bond or other chose in action of the testator without implying a fraudulent collusion with the executors to misapply the assets."

This case was affirmed on appeal by Lord Eldon, 17 Ves. 152.

Lord Eldon, giving judgment, after a review of all the cases, recognises the right of a creditor, of a specific legatee, of a pecuniary legatee, and of a residuary legatee, in certain cases, to follow assets applied by an executor, otherwise than in discharge of the trusts of the will; but he adds, referring to the particular circumstances of the case then in judgment, at p. 172: "Has this Court ever said, that a deposit under such circumstances could be disturbed *at the instance not of legatees of any kind, but of co-executors* who did not interfere in the affairs of the testator during fourteen years."

In the case before us, the plaintiff, besides being one of the executors appointed under the will and now sole surviving executor, fills also the character of residuary legatee, and I entertain no doubt that it was quite competent for the plaintiff, for valuable consideration paid by the defendant to the plaintiff, or even to his brother, to pledge the mortgage in question as a security to the defendant for repayment of such consideration, so as to exclude all right in the plaintiff, now to treat the defendant's detention of the mortgage under such a pledge or deposit as wrongful and actionable at the suit of the present plaintiff.

The case therefore resolves itself into the question: Does the evidence, or do the inferences properly deducible

from the evidence, warrant the conclusion that the plaintiff authorized the deposit of the mortgage with the defendant, as a security for repayment to him of any, and, if any, what amount, or did he ratify such deposit after it was made.

The conclusion of fact which the evidence fairly warrants, as it seems to me, is, that the testator died, prior to the month of July, 1857, having by his last will and testament made the present plaintiff and his father, now deceased, executors and trustees of his will, and the present plaintiff residuary legatee: that the plaintiff and his co-executor proved the will and assumed the trusts thereof: that prior to the 26th April, 1864, the plaintiff, being in England, wrote to his brother, Mr. Thomas McLean, then residing in Toronto, to send to him some money of which he was in need: that at this time the said Thomas McLean as agent of his father, the plaintiff's co-executor, had access to or possession of the mortgage in question as assets of the estate of the testator Cameron: that the said Thomas McLean, having himself previously had pecuniary transactions, whereby he became and then was indebted to the defendant in the sum of \$279, or thereabouts, and being desirous of raising a sum of £25 sterling to send to his brother, the present plaintiff, in pursuance of his request for money, applied to the defendant, who agreed to advance to the said Thomas McLean, for the express purpose of being remitted to the plaintiff, the said sum of £25, upon condition, however, that the said Thomas McLean should give to the defendant, besides his own undertaking, collateral security, not only for such sum of £25, so then agreed to be advanced, but also for the sum of \$279, then due by the said Thomas McLean: that the said Thomas McLean proffered to the defendant the mortgage in question, as and for such collateral security, shewing at the same time to the defendant the testator's will, whereby the above plaintiff appeared to be residuary legatee of the testator: that the said Thomas McLean, when proffering such mortgage to the defendant as such collateral security,

did not state that he was then authorized by his brother the present plaintiff, unconditionally, to deposit the mortgage with the defendant; but upon the faith of the deposit which he did make, accompanied with the promise that he would communicate the circumstances attending his depositing it, and would endeavour to obtain the plaintiff's consent thereto, the said Thomas McLean procured a bill of exchange for the said sum of £25 sterling, which he transmitted to his brother, the plaintiff, then in England.

I think it also a fair inference to draw from the evidence, that the said Thomas McLean did, by a letter accompanying the draft, inform the plaintiff of the circumstances attending the deposit of the mortgage, and, among those circumstances, that he could not obtain the £25 sterling, which he was remitting to him, except upon the condition that he should deposit the mortgage, as well as security for it as for the sum due by himself, amounting in the whole to about \$401, and upon the promise that he should endeavour to procure the plaintiff's consent to such deposit as collateral security for the whole of the said sum of \$401: that the plaintiff never did, at any time prior to his return to Canada, which took place in 1867, repudiate such deposit, or give, or cause to be given, to the defendant any notice that he had not consented to and ratified such deposit: that the plaintiff never since his return to Canada in 1867, took any steps towards invalidating the deposit so made by the said Thomas McLean with the defendant, until some time in the autumn of 1875, when he caused a demand to be served upon the defendant, which was followed up by this action commenced on the 5th May, 1876.

Upon the whole, I think that we are warranted in drawing the inference that Thomas McLean did, immediately after the deposit in April, 1864, communicate to the plaintiff all the circumstances attending the deposit, and that he had promised to endeavor to procure the plaintiff's consent thereto, and that the plaintiff having received the benefit of the £25 sterling so procured, and by his conduct in the presence of the information so communicated to him by his

brother, has ratified the deposit to the full extent of the amount for which the mortgage was deposited, namely, \$401 and interest thereon, from the 26th April, 1864, the date of the deposit; and that no principle of justice requires us at the plaintiff's instance to disturb the verdict rendered upon the fifth plea.

HAGARTY, C. J.—I feel more hesitation in this case than my learned brothers. But, on the whole, I am not prepared to dissent from their view as to the proper conclusion to be drawn from the evidence, fortified as the defendant's contention is by the number of years allowed to elapse after the mortgage came into his hands without direct challenge of his right to retain it.

Assuming Mr. T. McLean's account of the transaction as to the defendant's advance of the money to be correct, I think we must now assume that he informed the plaintiff thereof: that the latter retained the money with a knowledge of the circumstances, and has, down to making the demand, ratified and confirmed what was done by his brother.

I agree with the general view of the law as laid down by my brother Gwynne.

I hesitated long as to the right to retain for the debt due by T. McLean; but as it was all one transaction, and the fresh advance made on the deposit of the mortgage, I do not see how to distinguish between the two sums.

GALT, J., concurred with GWYNNE, J.

*Rule discharged.*

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## O'CONNOR ET AL. V. BEATY.

*Deed—Escrow—Dower—Title.*

No form of words is necessary to constitute the delivery of a deed as an escrow, but the facts and surrounding circumstances may be looked at to see whether such was the intention of the parties.

On a sale of land the deed and mortgage back for the unpaid purchase money were executed respectively by the vendor and purchaser at one K.'s, and left with him until their respective wives should come in and bar their dower; but there was nothing to shew that the instruments were to have no operation until the dower should be barred, nor until a good title was shewn, nothing having been said at the time as to title, whilst it appeared that the defendant, the purchaser, had been for years in possession of the land, had made a payment on the mortgage, which was endorsed thereon, and used the deed in endeavouring to raise money on the land; and it also appearing that the covenants in the deed were sufficient to protect the purchaser against any claim for dower or against certain incumbrances afterwards discovered.

*Held*, that there was nothing to justify the inference that the instruments were delivered as escrows until the dower should be barred or a good title shewn.

IN this case there were two actions between the same parties. One an action of ejectment, brought upon a mortgage executed by the defendant; and the other upon a covenant to pay the mortgage debt contained in the same mortgage.

Both cases were tried before Hagarty, C. J., without a jury, at Barrie, at the Fall Assizes of 1876.

The land comprised in the mortgage deed was, by an indenture of bargain and sale of even date with the indenture of mortgage, purported to be conveyed by the testator McFarlane, to the defendant in fee simple, and the mortgage back was intended to secure the purchase money mentioned in the deed of mortgage and sale.

The sole question at the trial was, whether or not, as was contended by the learned counsel for the defendant, both the deed of bargain and sale and the mortgage were intended as escrows, and delivered to one Kelly upon the agreement between the testator, McFarlane, and the defendant, that neither should have any operation unless, nor until McFarlane should procure three certain mortgages which were then, and, as was alleged in the plea to the action

on the covenant, "still are duly registered upon the lands comprised in the indentures, and were then, and still are incumbrances thereon, to be properly discharged or otherwise removed, and until the said McFarlane should otherwise complete his title to the premises, nor until the wives of the defendant and of the testator respectively, should sign the said deed and the said mortgage respectively."

Both the indenture of bargain and sale and the mortgage were drawn or prepared by one Kelly, in whose presence they were signed and sealed by the testator and the defendant respectively, and when so executed were left in the hands of Kelly.

The learned Chief Justice found that the deeds were left with Kelly, and that the wives were to come in and execute, but that they were not delivered as escrows, or conditionally, so as to prevent the whole of testator's estate passing to the defendant; that the defendant remained for years in possession under the deed, and tried to raise money on the land, and that as soon as the defects were found in the title, testator promised to set them right; and he entered a verdict for the plaintiffs.

In this term, November 23rd, 1876, *McCarthy*, Q. C., obtained a rule *nisi* under the Law Reform Act, to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant.

During the same term, November 29th, 1876, *Lount*, Q. C. shewed cause. There was a complete delivery and passing of the estate. Although the deeds were left with Kelly for the wives to come in and execute, it was never intended that the sale was to remain open until they did execute. The defendant's subsequent payment of a portion of the mortgage money, his taking possession and making improvements, and endeavouring to raise money on the land, all tend to shew that defendant treated the transaction as complete. Moreover, dower is only a ground for compensation and not an objection to title; and the plaintiff at the trial was willing to give a release of dower: *Sugden on Vendors*, 14th ed., 205, 305, 433-4; *Commercial Bank v.*

*McConnell*, 7 Grant 323. As to defects in the title, there was no objection raised as to title at the time, and no such defects exist. At all events, if any, they are now cured by the Statute of Limitations.

*McCarthy*, Q. C., contra. The proper construction to place on the evidence is, that the deeds were left as escrows until the wives should come in and execute. It is not necessary that a party should say that he delivers a deed as an escrow, so long as the facts and surrounding circumstances shew that such was his intention. The cases also shew that when several persons are to execute, there is no complete delivery until all do execute: *Bowker v. Burdekin*, 11 M. & W. 128; *Gudgen v. Besset*, 6 E. & B. 986; *Dutton v. Morrison*, 17 Ves. 193; *Trust and Loan Co. v. Covert*, 32 U. C. R. 222. The rule as to compensation does not apply here, as nothing was said as to compensation, but that the dower should be barred and no money was kept back, the mortgage being for the whole amount. If McFarlane had said that he could not get the dower barred, the question of compensation might have arisen. The testator was also to make the title good. The after conduct of the parties shew that they treated it as an incomplete transaction. There is nothing in defendant's taking possession, as taking possession in this country is not an acceptance of title. At all events defendant was entitled to possession under the equitable contract of sale.

December 28th, 1876. GWYNNE, J., delivered the judgment of the Court.

It was not contended that any form of words was made use of expressing the intention of the parties to the deeds that they were delivered to Kelly as escrows, but it was contended upon the authority of *Bowker v. Burdekin*, 11 M. & W. 128, and *Gudgen v. Besset*, 6 E. & B. 986, that, as is undoubtedly the case, no form of words is necessary to constitute a delivery as an escrow, but that all the facts attending the execution are to be looked at, and that if it

can reasonably be inferred from those facts that the instruments were not intended to take affect as deeds until a certain condition should be fulfilled, and were delivered upon such an agreement, the delivery would only operate as an escrow. The learned Chief Justice of this Court, before whom these cases were tried without a jury, has found that the instruments were not delivered or intended to operate as escrows, and in this finding we entirely concur.

The deeds themselves were not brought before us, but upon the argument it was admitted that the deeds of bargain and sale contained covenants against the testator's own acts, and the abstract of title which is before us shews that the incumbrances objected to were such as would come within that covenant. Moreover it appears that nothing was said as to any incumbrances, they were not in fact discovered as existing until long after, when, as it appears, the defendant, claiming title under the deed executed in his favor, was trying to obtain a loan upon it. Then the deeds were left in Kelly's hands, and, it appears by his evidence, that it was agreed that the wives of the testator and of the defendant respectively should come and execute the instruments in his hands, barring their dower respectively; but the covenants in the deed and mortgage respectively cover an incumbrance in the nature of dower, if the inchoate claim should mature into a right, so that regarding the instruments as perfected, so far as the parties executing were concerned, the grantees respectively had security against the right of dower.

That it was intended that the dower of the respective wives should be barred we have no doubt, but in the facts of the deeds being left with Kelly, and of a promise of the testator and of the defendant respectively that their wives should come and execute the deeds in Kelly's hands, we see nothing from which we could reasonably infer an agreement or intention that the deeds, executed as they were both by the testator and the defendant respectively, should have no operation until the wives should sign.

Then again we find that the defendant paid a sum of money on account of that secured by the mortgage. It is now suggested that it was not paid on the mortgage, but upon a verbal contract pre-existing; but the amount is endorsed upon the mortgage as a payment upon it, while the mortgage remained in Kelly's hands. In short, the possession of the land by the defendant, and the acts of the defendant, both in paying the moneys secured by the mortgage and on account of that security and using the deed of bargain and sale to raise money upon the title as his own, all concur in repudiating any idea of an intention that the instruments were delivered as escrows and were not to operate at all until some condition should be fulfilled, and we can see nothing to justify the inference that they were executed merely as escrows.

The rules therefore will be discharged.

*Rules discharged.*

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## MASON ET AL. V. JOHNSON.

*Piano—Agreement for hire and sale of—Property passing—Evidence—Replevin.*

By an agreement signed by defendant he acknowledged the receipt from the plaintiffs on hire at \$6 per month of a piano, valued at \$300, which he was to pay the plaintiffs if it were destroyed or not returned to them on demand, in good order, &c. It was agreed that defendant might purchase it for this sum by two payments of \$150 each on the 1st of July and November respectively, but until payment of the whole purchase money it was to remain plaintiffs' property on hire by defendant, and on default in the punctual payment of any instalment of such purchase money, or of the monthly rental, the plaintiffs might resume possession, although there might have been a part payment of the purchase money or a note or notes given therefor, the agreement for sale being conditional and punctual payment being essential to it; but, if so assumed by plaintiffs and returned in good order, any sum received on account of purchase money beyond the amount due for rent and expenses incurred was to be repaid. The defendant gave two notes for \$150 each payable at the dates mentioned in the agreement, and shortly after the maturity of the first note paid \$50 on account of it; and subsequently, on being pressed by the plaintiffs, he gave them a mortgage on some lands, which the plaintiffs received as collateral security for the amount then due, reserving their rights under the agreement. The piano remained with defendant for over two years, nothing being paid on the mortgage or any further sum on account of the notes or for rent. The defendant swore that he had bought the piano before he signed the agreement.

*Held*, that under the agreement the property in the piano remained in the plaintiffs until the payment of the amount fixed as the purchase money, and that there was nothing in the evidence, more fully set out below, to shew any contrary intention; and that default having been made the plaintiffs might maintain replevin.

REPLEVIN for a piano.

Pleas: *non cepit*; and that goods were not the plaintiffs. Issue.

The cause was tried before Galt, J., without a jury, at Toronto, at the Fall Assizes of 1876.

It appeared that on the 21st November, 1873, the plaintiffs' agent, who was in Dunnville where defendant lived, saw defendant as to his taking one of the plaintiffs' pianos; and after some negotiation, defendant signed the following agreement:

"No. 170.

"PIANOFORTE AND CABINET ORGAN WAREROOMS.

"Received from Messrs. Mason, Risch, & Newcombe, one style, one harmonic piano, No. 2780, on hire, for ———

months, at six dollars per month, payable in advance, the said pianoforte being valued at \$300, which sum I agree to pay in the event of the said instrument being injured, destroyed, or not being returned to Messrs. Mason, Risch, & Newcombe, on demand, free of expense, in good order, reasonable wear and tear excepted. It is agreed that I may purchase the said pianoforte for the sum of \$300, payable as follows: \$150, payable on July 1st, 1874, and \$150, payable on November 1st, 1874, with seven per cent. interest on last note only; but until the whole of the said purchase money be paid, the said pianoforte shall remain the property of Messrs. Mason, Risch, & Newcombe, on hire by me. And in default of the punctual payment of any instalment of the said purchase money, or of the said monthly rental in advance, Messrs. Mason, Risch, & Newcombe may resume possession of the pianoforte without any previous demand, although a part of the purchase money may have been paid, or a note or notes given by me on account thereof, this agreement for sale being conditional, and punctual payment being essential to it; but, in the event of the said pianoforte being so assumed by them, and being returned in good order, any sum received on account of the purchase money, beyond the amount due for rent and any expenses incurred in reference to the said instrument, will be repaid. It is agreed that the undersigned shall have the privilege of exchanging this piano any time during three years, if not damaged, at the full price, for any of our higher priced pianos."

(Signed) "JOHN T. JOHNSON,  
"Dunnville."

"Dunnville, Nov. 21st, 1873."

At the time the agreement was signed the agent gave defendant a memorandum that the rent should not be payable in advance, and was to be considered part of the purchase money.

On the 9th December, 1873, the plaintiffs, on the receipt of a letter from their agent informing them what he had done, wrote defendant that their usual terms were to have a cash payment, which they felt defendant would have no objection in making on their allowing him 10 per cent. discount, thereby making his first payment \$135, and that his second payment should be made in 6 instead of 12 months.

On 11th December, 1873, defendant wrote that he was unwilling, as he had already informed the agent, to make a cash payment, and that unless, therefore, the terms agreed upon were carried out, he would not take the instrument.

On the 18th December, 1873, the plaintiffs wrote in reply that, although the agreement was contrary to their established rules, still as the defendant had entered into the agreement in good faith, they would carry it out, and would send him the piano.

On December 28th, 1873, defendant wrote acknowledging the receipt of the piano, and enclosing the notes.

On December 31st, the plaintiffs wrote acknowledging the receipt of the notes, and reminding defendant that the first note fell due on 1st proximo, and requesting a remittance; and on the 26th June and July 4th, there were further letters to the same effect.

On the 16th July, the defendant wrote inclosing \$50 on account of the note due on the 1st July, and apologising for not having before attended to the matter, in consequence of being disappointed in realizing the amount of a judgment he had recovered against a person for \$1500, and hoping to be able to send plaintiffs the balance of the note before long, &c.

On the 21st July, 1874, the plaintiffs wrote acknowledging the \$50, and requesting payment of balance by the 1st August.

On October 6th, plaintiffs again wrote defendant expressing regret at not having received further remittance, and as nearly three months had elapsed, they were obliged to call up arrears to meet heavy engagements maturing, and informing defendant that they had drawn on him at ten days sight for \$53, and at 20 days sight for \$50, being \$100 past due, and \$3 interest and collection, and requesting him to honour them.

On the 14th October, the defendant wrote informing plaintiff of the drafts having been presented, and of his having refused to accept in consequence of his inability to

meet them when they fell due, as the judgment he had before mentioned had not been yet paid, but that he had caused a *fi. fa.* lands to be issued, but that the lands could not be sold before the 1st March, 1875. He stated, however, that he was willing to secure them in any way: "I will give you a mortgage on real estate payable on the 1st of June, 1875, at 8 per cent. interest for what I owe you, or return you your instrument, and lose the \$50 paid."

In reply to this the plaintiffs wrote on October 16th 1874, that after defendant's frank avowal of his circumstances, and his evident endeavour to do all he could, they would not avail themselves of his offer to forfeit the \$50, if the matter could be arranged in any other way. "We would accept the mortgage on the real estate you refer to, provided, of course, it is sufficient for amount of balance, \$266.16, said mortgage payable on or before June 1st, 1875, and bearing 8 per cent. interest. As we shall hold this merely as collateral, we shall expect payments in the interval, especially will rely on a settlement in March," when he realized his execution.

The defendant having delayed sending the mortgage, some further correspondence took place.

On December 11th, defendant wrote that the mortgage had been executed, and would be sent forthwith; that it would become due in June, but he trusted to pay it by the early part of April.

On December 29th, 1874, the plaintiffs wrote acknowledging receipt of mortgage, "which we received subject to approval as to the worth and value of property, as collateral security for your debt to us, but on the understanding that, while we shall not resort to the security on the land until the 1st June, 1875, we reserve to ourselves our rights under our "Condition Hire Receipt, in the meantime, and that we fully expect payment of the debt at an earlier period, as stated in our former letter."

On the 7th June, 1875, the plaintiffs again wrote. "We notice that your collateral security, namely, the mortgage,

&c., matures on the 15th instant. From your previous letter, we had expected the amount would have been paid long before this, and therefore desire to know per return of mail, whether you propose meeting the amount as then proposed, or whether we shall resort to the security," &c.

On June 22nd, the plaintiffs again wrote, that as they had received no reply, unless the matter was settled by 1st July, "you will forfeit your option of purchase of piano under the 'Conditional Hire Receipt,' &c."

On April 24th, 1876, the plaintiffs again wrote, that as some time had elapsed since they last wrote, something must now be done: that defendant must either pay hire and expenses, and relieve piano, or the purchase be completed: that he had only paid \$50, his privilege to purchase had long since become forfeited, and that unless some more satisfactory arrangement was made, the piano must be returned; and they rendered him an account shewing amount due up to date for rent, expenses, &c., \$143: that their agent would be up at defendant's place soon, when they trusted the matter would be arranged.

On June 10th, they again wrote, that as defendant had failed to make any arrangement, that unless their account for hire, &c., amounting to \$143, was paid by the 20th inst., and piano returned to them, free of expense, they would place the matter in the hands of their solicitor.

*Thomas G. Mason*, one of the plaintiffs, stated that the plaintiff obtained the piano merely on hire under the agreement: that none of the notes had been paid, but that they received the \$50 on account of the agreement: that when they drew on defendant for the \$103, there was not that amount then due for rent: that the mortgage was received merely as collateral security, and had not been paid: that in September 1876, he saw defendant and asked if he could not arrange the matter, but defendant said he could not, but that he would give up the piano, if the plaintiffs would give him up the mortgage, which the plaintiffs refused to do, as they held it to pay the rent over due, and expenses incurred.

The defendant stated that the piano was bought before he signed the agreement, and that he only signed it because the agent told him that it was a mere matter of form : that he never had any idea that they could take the piano for the non-payment of a month's rent of \$6, and that if he had thought so, he never would have taken it: that the \$50 paid was paid on one of the notes : that the mortgage was given for the balance of the purchase money, and that they said nothing at that time about rent.

The writ issued on the 29th August, 1876.

The plaintiffs' books were also produced ; the amount received was not entered as rent, and the charge for rent was not entered in the books until September 1876.

The learned Judge entered a verdict for the plaintiffs.

In this term, November 24th, 1876, *Ferguson*, Q. C., obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict for the plaintiffs, and to enter a nonsuit or verdict for the defendant.

During the same term, November 29th, 1876, *Rose* shewed cause. In the case of *Stevenson v. Rice*, 24 C. P. 24, this Court decided that under a similar agreement, no property passed. In that case no payment was made. The payment here cannot alter the plaintiffs' rights, as it was made under the agreement, and subject to their right of property. The fact also of their taking the mortgage cannot alter their position, as it is clearly proved that they took it merely as collateral security. The plaintiffs are entitled not only to the return of the piano, but to hold the mortgage and notes to satisfy the overdue rent and expenses incurred. The learned Judge has found upon the evidence that the property did not pass, and the Court should not interfere with his finding : *Smith v. Hamilton*, 29 U. C. R. 400.

*Ferguson*, Q. C., contra. If the written agreement is to be looked upon as the contract between the parties, it might probably be held that no property passed. Here, however, the written agreement was not the contract, for the contract

of sale took place prior to the agreement being signed, when the property had already passed to defendant, and he only signed the agreement on the agent's representation that it was a mere matter of form. The correspondence which took place between the parties, the payment of the \$50, and the giving the mortgage, as well as the entries in the plaintiffs' books, shew that the plaintiffs treated it as an absolute sale. The plaintiffs' only remedy is for the unpaid purchase money.

December 28th, 1876. HAGARTY, C. J.—In this action of replevin, the whole question to determine is, whether the plaintiffs at the time owned the property or not.

Assuming the written agreement to be the true contract on which the defendant obtained possession of this piano, there seems to be no reason whatever, as between the parties, why it should not govern their position, or why the plaintiffs should not be still considered the owners, and entitled to resume possession on default. No rights of creditors or question as to fraud on creditors arise.

But the defendant says he only signed the agreement as a matter of form: that he had purchased the piano from the agent before he signed the agreement: that he had no idea they could take the piano for non-payment of rent, \$6 per month; and that he would not have taken it on such terms.

But it is impossible to gather from his evidence that any imposition was practised upon him, or that he should not be bound by its terms.

The question before us is not whether he should pay the rent or not, but whether the piano was not to remain the property of the plaintiffs till paid for. The defendant swears nothing against this vital part of the case.

The real bargain seems to have been that when he paid the two notes, which he gave for \$150 each and interest, the piano became his, and not till then.

The reservation of rent seems inserted, we presume, in anticipation of difficulty, either from non-payment of the price agreed on, or of difficulty with creditors, &c.

All the defendant ever seems to have paid was \$50 on one note. He had the piano two or three years.

The agent who acted for the plaintiffs gave the defendant a memorandum of the same date as the agreement, that the rent should not be payable in advance, and was to be considered part of the purchase money. The piano had not then been delivered to the defendant.

On the 18th November, 1874, on the plaintiffs pressing for payment, the defendant executed a mortgage to them on some real estate for \$266.16, payable on or before 15th June, 1875, with interest. This would be the amount then due on the notes and interest. Nothing was paid on this mortgage.

It appears clearly that the plaintiffs only received this as collateral security. Their letter of Dec. 29th, 1874, acknowledging its receipt, says they receive it as collateral security for his debt to them, and reserving their rights under the Conditional Hire Receipt.

The writ of replevin issued 29th August, 1876.

Not until April, 1876, after all the notes and mortgage were long past due, was any claim made by the plaintiffs for rent.

Mr. Ferguson for the defendant, argued on the use of expressions in the letters and account rendered, as shewing that the piano had been sold to the defendant on credit.

No very special importance need be attached to any expressions of this kind, as we think the true contract between the parties is clear.

The piano was sold to the defendant certainly in one sense, viz: that, if he made certain payments, it was to become his property. As between him and the plaintiffs, we see no reason for holding that the right of property should not in the mean time remain in the plaintiffs.

The learned Judge who tried the case found for the plaintiffs.

After hearing the arguments and reading all the evidence and documents filed, we are satisfied that the law and the merits are wholly with the plaintiffs.

GWYNNE, J.—As between the parties themselves to this contract, it appears to be immaterial whether the transaction was originally a letting of the piano on hire at a yearly rent, with a contract for sale superadded, or a contract for sale only; for it appears to be clear throughout the whole dealing, and in every thing that passed, that the plaintiffs retained in themselves by special agreement their property in the piano until it should be paid for. The defendant at most had possession of the plaintiffs' property upon bailment, if not at rent, still only under an agreement whereby by paying for it he could make it his own. The property, in my opinion, was not to pass until payment.

GALT, J., concurred.

*Rule discharged.*

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## ELLIOTT V. BULMER ET AL.

*Statute of Limitations—Title by possession—Boundary line fence.*

Between thirty and fifty years ago the owners and occupiers respectively of adjoining lots, 16 and 15, through whom plaintiff and defendants claimed, erected and maintained at their equal charge a boundary line fence between their lots, and they had respectively been in possession, during that period, of the land up to the fence. The plaintiff commenced clearing on the north or rear of his lot, continuing in a southerly direction until within about four chains of the concession line in front, when, to protect the land so cleared, he erected a fence across his lot to the boundary fence, leaving the piece to the south up to the concession line open until about seventeen years ago, when he put up a fence along the concession line; but he had always maintained a roadway from the concession along the line of the fence as the means of access to his house. By a recent survey defendants claimed that the boundary fence was erroneous and encroached on lot 15, and that he was entitled to the piece of land in question, lying between the new line and the boundary fence, and to the south of the fence first enclosed by plaintiff across his lot.

**Held** that the plaintiff had acquired a title by possession to all the land up to the boundary fence, even though such fence might not be on the true line, and encroached on defendants lot 15; and that under the circumstances, his only having erected the fence along the concession line within the last seventeen years was of no importance.

THE declaration was in trespass *quære clausum fregit*, alleging the entry and trespass to have been committed upon a piece of land of the plaintiff's, setting it out by metes and bounds, not describing it as being part of any particular lot.

Pleas—1. Not guilty.

2. That the land was not the plaintiff's.

3. That the land in question was the close soil and freehold of one Brumwell, as whose servants and by whose command the defendants justified.

The cause was tried before Patterson, J., and a jury, at Peterborough, at the Fall Assizes of 1876.

At the trial it appeared, upon the testimony of eight witnesses, of whom the defendant Bulmer was one, that for upwards of thirty years there had been a boundary fence between lots 15 and 16, in the 3rd concession of the township of Smith, which extended from the concession line in front to the concession line in rear

of that concession: that this fence was thirty years ago an old fence; and some of the witnesses spoke of a fence having been first erected on the same line as far back as fifty years ago, along an old blazed line, then apparent from front to rear of the concession.

No evidence whatever was offered in contradiction of this. The plaintiff, and those through whom he claimed, owners and occupiers of lot 16, and Brumwell, in whose right the defendants justified, and those through whom he claimed, owners and occupiers of lot 15 during all the time aforesaid that the said fence was up, had maintained and repaired it equally: the occupiers of lot 16 repairing the north half, and the occupiers of lot 15 repairing the south half, upon which half, close to the concession line in front, the piece of land in dispute lay.

It was said that the owners of lot 15 had recently discovered that this old fence, so used for a period of from thirty to fifty years, was not on the true line, which it was said, proceeding from the same point as the old fence on the concession line in front, ran in an easterly direction, encroaching upon what had always been assumed to be lot 16, until at the rear of the lot it reached a point about two chains to the eastward of the point where the old fence, as it had been maintained, reached the concession line in rear.

It was not for trespass upon the whole of the space between these two lines, namely, the old fence and the newly surveyed line, that this action was brought. The *locus in quo* consisted of a small angle of ground at the south end of the concession, starting at the point on the concession line from which both lines started, and extending along the line of the old fence for the distance of about four chains; thence easterly 25 links, forming the base of the angular piece in question; thence to the point of commencement on the concession line in front.

How the recently surveyed line was ascertained to be, or whether it was or not in fact, the true line, did not appear, because the plaintiff, not questioning in this action the cor-

rectness of the line, wholly relied upon the title acquired to the piece in dispute by the actual possession of himself and those through whom he claimed for the above period, varying from thirty to fifty years.

The defendants' contention at the trial was, that the plaintiff could not maintain a title by possession, for the reason that, although it was not disputed that the line ran as stated, and had been maintained for the period named from the front to the rear of the concession, yet, as it appeared that the occupiers of lot 16 had only within seventeen years erected a fence along the concession line in front of their lot, connecting with the old fence at right angles, and there being, as was contended, no actual exercise of ownership upon the angle in question until the erection of the fence on the south, enclosing the lot 16 from the road, there was no such possession shewn as would entitle the plaintiff to recover by length of possession; the piece being, as it was contended it must upon the evidence be held to be, parcel of lot 15, of which lot Brumwell was seized in fee, save in so far as the Statute of Limitations may have divested him of any part.

The learned Judge entered a nonsuit, but reserved leave to the plaintiff to move to set it aside and to enter a verdict for him, if the Court, upon the evidence, and drawing inferences of fact as a jury, should be of opinion that a verdict should be entered for him.

In Michaelmas term, November 23rd, 1876, *Watson* obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict entered for the defendants and to enter a verdict for the plaintiff.

During the same term, December 2nd, 1876, *J. K. Kerr*, Q. C., shewed cause. To entitle the plaintiff to recover he must prove an actual possession of the piece of land in dispute. Actual possession over a portion of a lot accompanied by acts of ownership over the residue may be sufficient to give a title by possession to the whole of the lot; but this only applies to land forming a part of the lot itself,

and not, as here, where the land claimed forms no part of it, but of an adjoining lot. The evidence shews that there was no possession of the piece in dispute until the last seventeen years, when the plaintiff erected the fence along the front of the concession: *Mulholland v. Conklin*, 22 C. P. 373; *Davis v. Henderson*, 29 U. C. R. 334; *Bernard v. Gibson*, 21 Grant 195; *Dundas v. Johnston*, 24 U. C. R. 547; *Allison v. Rednor*, 14 U. C. R. 459; *Doe dem. Beckett v. Nightingale*, 5. U. C. R. 518.

*Watson*, contra. The evidence shews that the owners of lots 15 and 16 over thirty years ago at their equal cost erected and have ever since maintained the division fence between these lots, believing it to be the true boundary line, and that each have been in the possession of the land on either side of the fence ever since. According to the cases this would give a good title by possession of the lands on either side of the fence, even though the fence may not be on the true line and a portion of the land so in possession may form part of the adjoining lot. There was clearly evidence of possession of the piece in dispute. The plaintiff used it as a road to the concession and sold wood off of it. In addition to the above cases he referred to the following: *Incorporated Synod of Toronto v. Kipp*, 33 U. C. R. 220; *Bell v. Howard*, 6 C. P. 292; *Martin v. Weld*, 19 U. C. R. 631; *Doe dem. Taylor v. Sexton*, 8 U. C. R. 264; *Denison v. Chew*, 5 O. S. 161.

December 28th, 1876. GWYNNE, J., delivered the judgment of the Court.

We are of clearly of opinion that the plaintiff is entitled to a verdict.

The only inference which we think can be properly drawn, and which a jury should and would draw, from the evidence is, that the respective occupiers of lots 15 and 16 erected and maintained this fence since it was first erected as, and believing it to be, the true line between the lots, and that the occupiers of lot 16 had in their actual possession and enjoyment all the land up to and extending along

the fence from front to rear, upon one side of the fence and the occupiers of lot 15 in like manner all the land along the fence upon the other side of it; and that the fence was always regarded as being the true boundary between the lots.

We cannot see that the erection of a fence in front of lot 16 along the concession line in front has anything whatever to do with the point in dispute.

The material point is, that a fence used as a line fence between lots from the highway or concession line in front to the highway or concession line in rear, has been maintained for a period of from thirty to fifty years. The law requires the occupants of adjoining lots to erect and maintain at their equal charge the boundary line fence between them.

In this case the occupants of lots 15 and 16 did erect and for the above period maintain the fence in question as a boundary line fence at their equal charge. The plaintiff, and those through whom he claims, maintained the north half, where their clearing chiefly was, extending up to the fence, and Brumwell and those under whom he claims lot 15 maintained the south half, where their clearing chiefly lay. The plaintiff, and those through whom he claims, commenced clearing upon the north end of their land and continued in a southerly direction unto a point distant about four chains from the concession line in front, where, to protect the cleared land from the piece lying south to the concession, they erected a fence across their land on lot 16 to the fence in question.

True it is, that, having no occasion for a fence along the concession line in front, they did not erect one until about seventeen years ago; but they had always maintained a roadway from the concession line in front across the very piece in dispute, along the line of the old fence in question, which they used, as of right, as access to their house on the rear or north side of their lot.

In short, they had as much possession of the piece constituting the *locus in quo*, as if it had been in truth, as it was believed to be, part of lot No. 16.

Now, when the occupants of these adjoining lots, nearly fifty years ago, erected, and ever since, until the time of the entry made by the defendant, maintained this fence as a boundary line-fence between them from the front to the rear of the concession, can there be any doubt that such erection and maintenance of a fence as a boundary line constituted a recognition of the possession of each other up to the fence in the assertion of a right, although not constituting a recognition of the right?

Cases there have been which have raised a question whether a boundary line-fence between lots, although erroneous, maintained for a part of the length of the lots, should not be held to give to each party constructive possession of the rest of the land, where there was no fence, along the line produced of that which had been erected; but from the time of *Denison v. Chew*, 5 O. S. 161, we are not aware that any doubt has been suggested as to the fact of each party on either side being in possession of the land up to the fence which has been erected and maintained as a boundary line-fence, although it should turn out not to be on the true line, and although it should in part pass through bush land.

For our own part we do not desire to cast any doubt upon the point.

In the case before us, we cannot hesitate as jurors to find as a fact that the plaintiff, and those through whom he claims, have had possession up to the old fence throughout its entire length, and we have no doubt that such possession is precisely that which, being continued for twenty years, the law intended should divest the true owner of his title and transfer it to the continuous occupants for twenty years.

The verdict, therefore, must be for the plaintiff, and as the action is only in assertion of a right, and no wanton damage committed, we assess the damages at \$5.00.

Verdict for the plaintiff, and \$5.00 damages.

*Rule absolute.*

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During this term the following gentlemen were called to the Bar :—

HENRY HATTON GOWAN ARDAGH, JOHN STOCKS FRASER, EDWARD PERRY CLEMENT, WILLIAM HENRY CULVER, DANIEL WEBSTER CLENDENAN, JAMES WILLIAM LIDDELL, JOHN WALLACE NESBITT, ALEXANDER CASIMIR GALT, HARRY SYMONS, ALBERT OGDEN, JACOB LEMON WHITE-SIDE, FREDERICK WILLIAM CASEY, CHARLES LESLIE FERGUSON, FRANK STAYNER NUGENT, THOMAS EDWARD LAWSON, RICHARD HARCOURT, GEORGE ATWELL COOKE, JAMES COLEBROOKE PATTERSON, JAMES CHESTERFIELD JUDD, ROBERT E. WOOD, MAITLAND MCCARTHY, EBENEZER WELBURY SCANE, JAMES WARREN, FRANCIS TYRRELL.

## SITTINGS IN VACATION

AFTER MICHAELMAS TERM.

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 MCKENZIE V. THE MONTREAL AND CITY OF OTTAWA  
JUNCTION RAILWAY COMPANY.

*Debenture—Coupon—Meaning of—Chose in action—Assignment of—  
Pleading.*

A declaration alleged that defendants, by their bond or debenture, &c., did bind themselves, &c., to pay the bearer of the said debenture on, &c., \$1000, and interest thereon half yearly at seven per cent. per annum on the 1st of March and September, at a named place, on presentation of the proper "coupons" therefor, and then annexed to the said bond, &c.: that the defendants delivered the bond to C. & Co., who thereby became the lawful holders of the said bond and coupons: that, after the making of the said bond, the coupon for \$35, being the instalment of interest due 1st September 1873, was duly presented at the said place, and was not paid, but was dishonoured, and payment refused; and that the said coupon and all claims in respect thereof have been assigned to the plaintiff, who now sues for the recovery of the amount thereof.

*Held*, declaration bad, for that it did not appear what a "coupon" was, or that its assignment alone gave any right of action, the covenant to pay interest being contained in the bond.

DECLARATION: that the defendants by their certain bond or debenture, bearing date the 11th November, 1872, and sealed with their corporate seal, and signed by their president and secretary, did bind and oblige themselves, and covenanted, to pay the bearer of said debenture, on the 1st September, 1902, \$1,000, current money of Canada; and also bound and obliged themselves, and covenanted with the bearer of the said bond, to pay interest thereon, in the meantime, at the rate of seven per cent. half yearly, on the 1st of March and 1st of September, at a named place, on the presentation at said place of the proper "coupons" therefor and then to said bond annexed, and the said company delivered the said bond to A. L. C. & Co., who thereby became the lawful holders of the said bond and coupons:

that after the making of the said bond the said coupon for \$35, being the instalment of interest due 1st September, 1873, was duly presented at the said place, &c., where the said coupon was payable, and the said coupon was not paid, but the same was dishonoured, and payment thereof was refused; and the said coupon, and all claims in respect thereof, have been duly assigned to the plaintiff, who now sues for the recovery of the amount thereof.

There was a plea to the declaration which was demurred to, but it is unnecessary to refer to it, as the judgment proceeds only on the declaration.

The following exceptions were taken to the declaration: that it discloses no cause of action: that it is not shewn that the plaintiff was the bearer of the bond referred to in the said declaration: that it is not shewn that the coupons referred to in the said declaration were annexed to the said bond at the time of the presentation thereof: that the plaintiff was not the bearer of the said debenture.

January 12th, 1877. *J. K. Kerr*, for the plaintiff: *Lyall v. City of London*, 8 C. P. 365; *Geddes v. Toronto Street R. W. Co.*, 14 C. P. 513; *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374; *Enthoven v. Hoyle*, 13 C. B. 373; *Re Blakeley Ordinance Co.*, L. R. 3 Ch. App. 154; *Re Natal Investment Co.*, L. R. 3 Ch. App. 355; *Re General Estates Co.*, L. R. 3 Ch. App. 758.

*M. C. Cameron*, Q. C., contra, cited: *Goodwin v. Roberts*, 33 L. T. N. S. 272, L. R. 10 Ex. 337, and cases there referred to.

January 19th, 1877. HAGARTY, C. J.—I find a great difficulty in holding that this statement shews any right of action in the plaintiff.

I can know nothing more of a "coupon" than what is here stated. There is a covenant with the bearer of the bond to pay interest half yearly on the principal sum. This is payable on presentation "of the proper coupon therefor."

Now, judicially, I cannot say what this is.

It is then averred that the said coupon for the sum of \$35, being the instalment of interest due on the 1st September, 1873, was presented, &c., but was not paid, and was dishonoured, and payment refused.

What then is averred to be assigned to the plaintiff? "The said coupon and all claims in respect thereof."

I cannot see what the effect of such an assignment can be, unless I know what is the "coupon," and its legal significance.

For all that is averred there may be no legal claim whatever on such a thing.

There is no averment that any right of action, or contract, or covenant to pay, has been assigned to the present plaintiff. The covenant to pay interest is in the bond or debenture.

It is not averred that all or any distinct part of such covenant has been assigned. The only chose in action in the declaration is, a covenant to pay a principal sum, and also to pay interest thereon. The covenant to pay the interest is with the bearer of the bond; it is qualified with the condition to produce something called a coupon, said to be then annexed to the bond.

I am unable to see what right to maintain this action in this plaintiff is shewn by averring that this coupon, and all claims in respect thereof, have been assigned to the plaintiff.

It may be assumed to be some memorandum or writing respecting the interest, but how its holder by assignment can maintain this action does not appear.

The charter of the defendants, 34 Vic. ch. 47, throws no light on it.

Section 13 empowers the issue of debentures, but says nothing of coupons, nor do I find them mentioned in the General Railway Clauses Act of 1868, or its amendments.

It was admitted on the argument that there was no legislation to help the interpretation of this term "coupon." I have, of course, seen such things, and am aware that

sometimes that they are in the form of notes to bearer for the amount of the instalment of interest.

I think I must hold the declaration bad; but it is very probable that it may be amended, and leave to amend on the usual terms is given.

In this view, I need not discuss the plea.

As to an assignment of part of a chose in action under 35 Vic. it may be well for the parties to refer to *Wellington v. Chard*, 22 C. P.

*Wharton's Law Lexicon*, 6th ed., at p. 246, says : "Coupons, interest and dividend certificates; also those parts of a commercial instrument which are to be cut, and which are evidence of something connected with the contract mentioned in the instrument. \* \* A coupon does not require a stamp; it is nothing more than an I. O. U."

See, as to form and stamp, *Enthoven v. Hoyle*, 13 C. B. 373, at p. 384.

*Judgment for defendants.*

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THE CORPORATION OF THE COUNTY OF HALDIMAND v. THE  
HAMILTON AND NORTH WESTERN RAILWAY COMPANY.

*Railways—Bonuses—Conditions—33 Vic. ch. 36, O.—34 Vic. ch. 41, O.—  
Construction of.*

By 33 Vic. ch. 36, sec. 7, municipalities were authorized to aid the Hamilton and Erie R. W. Co., subsequently incorporated with defendants, by way of bonus, subject to such restrictions and conditions as might be mutually agreed upon between the municipality and the directors of the railway; and by 34 Vic. ch. 41, amending this Act, the county were authorized on the petition of certain township and villages of the county, to grant such aid, and issue the debentures of the county payable by special rates and assessments in such townships, &c.

*Held*, that the powers given by the first Act to agree as to the conditions on which such aid should be granted, would apply to aid granted under the subsequent Act.

The conditions agreed upon in this case were, that the defendants should grant and continue to the Great Western R. W. Co., the Grand Trunk R. W. Co., and the Canada Southern R. W. Co., equal privileges as to working and using the defendants' railway: that defendants should have a siding and flag station at or near to two named villages on their line, and should cause or procure the Grand Trunk R. W. Co. to erect a station at or near a named point of intersection.

*Held*, that these conditions were all legal and valid; and that defendants, having received the debentures for the bonus, could not object that such agreement was *ultra vires*.

DECLARATION on the defendants' bond, dated 7th February, 1872, whereby the defendants, under the name of the Hamilton and Lake Erie Railway Company, became bound to the plaintiffs in \$20,000, subject to a condition whereby,—after reciting a by-law of the county duly passed to aid the defendants by a grant by way of bonus of \$65,000, subject to certain terms, restrictions, and conditions, the warden was authorized to issue debentures to that amount; but it was provided that the debentures should not be issued to the trustees to be appointed, &c., until the defendants should have executed a bond, conditioned to grant the Great Western Railway Company, the Grand Trunk Railway Company, and the Canada Southern Railway Company equal privileges in regard to working and using the Hamilton and Lake Erie Railway Company, &c.; and also, that the defendants should have a siding and flag station on their line at or near to each of two villages in the county, namely, Ballsville and Hullsville, and would cause and pro-

cure the Grand Trunk Railway Company to erect a station house at or near the intersection of the said Grand Trunk Railway with the third concession line of Seneca in the said county; and that the defendants had applied for the debentures, and the warden had deposited them with the trustees for the defendants, as provided by the by-law,—the conditions of the bond were declared to be that if the defendants should grant unto the Great Western Railway, the Grand Trunk Railway, and the Canada Southern Railway equal privileges in regard to working and using the defendants' line of railway, and should continue the same open to said companies on the same terms, and should also construct a siding and flag station on the line of their said railway at or near to each of the villages of Ballsville and Hullsville, and should cause and procure the Grand Trunk Railway Company to erect a station house at or near the intersection with the third concession line of said township of Seneca, then the obligation should be void, &c., otherwise to remain in full force, &c.: that the plaintiffs did thereupon deliver the said debentures to the said trustees for the defendants, who afterwards built their line, passing at or near the said villages.

The declaration then set out an Act of 38 Vic. ch. 48, O., authorizing the amalgamation of the defendants with the Hamilton and Lake Erie Railway, which was effected, under the name of "The Hamilton and North Western Railway Company," and set forth that every thing was done to make the bond the bond of the present defendants, and to entitle the plaintiffs to the performance of the conditions.

The declaration then alleged as breaches: 1. That, although a reasonable time had elapsed, and though requested so to do, the defendants had not erected and built the said sidings and flag stations.

2. That they had not caused or procured the Grand Trunk railway company to erect a station-house at the said intersection, &c., contrary to the conditions of the bond; yet the defendants had not paid the said sum of \$20,000.

To this the defendants pleaded, as to so much of the declaration as charged that they had not built the sidings and flag-stations: that the by-law was passed by the municipality of the county of Haldimand on the petition of the reeves and deputy-reeves of the certain townships of Walpole, Oneida, and Seneca, and the village of Caledonia in the said county, under the Statute 34 Vic, ch. 41, sec. 6; and provided for the issue by the corporation of the county of debentures, and for assessing and levying on the ratable property, in the said townships and village an annual special rate sufficient to include a sinking fund for the repayment of such debentures with interest thereon, and was duly approved by the ratepayers of those parts, and not of the whole county; and that the said bond related to the said by-law, and was made and executed in reference thereto; and that the said bond, and the conditions thereof, always were and still are *ultra vires* of the plaintiffs and of the defendants, and illegal and void.

And, as to so much of the declaration as charged that the defendants had not caused or procured the Grand Trunk Railway Company to erect a station-house as alleged, the defendants demurred, on the ground, that the plaintiffs and the Hamilton and Erie Railway Company had no power to enter into such conditions, and other grounds, all substantially to the same effect: and also that the Hamilton and Erie Railway Company, before amalgamation, may have procured the Grand Trunk Railway Company to make the stations.

This last objection was not urged in argument.

The plaintiffs also demurred to the plea, on the grounds:

1. That the defendants having accepted the terms of the conditions stipulated for by the plaintiffs are bound thereby.
2. The condition is not *ultra vires*.
3. The bond is good, whatever may be said of the condition.
4. The plea does not answer the cause of action to which it is pleaded.
5. The plea affords no excuse for breach of the condition.

*McLennan*, Q. C., for plaintiffs.

January 9th, 1877, *Bruce* (Hamilton), for defendants.

The following cases were referred to :—

*South Yorkshire R. W. and River Dun Co. v. Northern R. W. Co.*, 6 H. L. Ca. 113 ; *Ashbury R. W. Carriage and Iron Co., v. Riche*, L. R. 7 H. L. 653 ; *Grand Junction R. W. Co. v. Bickford*, 23 Grant 302 ; *Re Cork and Youghal R. W. Co.*, L. R. 4 Ch. App. 748.

January 12th, 1877. HAGARTY, C.J.—By Statute 33 Vic. ch. 36, O., the Hamilton and Lake Erie Railway Company are incorporated, and by section 7 municipalities are allowed to aid and assist “by loaning, or guaranteeing, or giving money by way of bonus or other means, to the company, or issuing municipal bonds to or in aid of the company, and otherwise, in such manner and to such extent as such municipalities, or any of them, shall think expedient, and subject to such restrictions and conditions as may be mutually agreed on between such municipality and the directors of the railway, such directors and the council of such municipality being hereby respectively authorized to make such agreements as may be necessary for the purpose.”

34 Vic. ch. 41, amends the last Act ; and sec. 6 authorizes the passing of a by-law, such as set out in the plea, for certain named municipalities in the county for the issue of debentures, to be provided for by special rates on the property in the sections named.

The by-law (sub-sec. 1) provides for the issue of debentures of the county, &c., and for the payment to the railway company of the amount of the bonus or donation, at the time and on the terms specified in the petition.

Sec. 8 provides that the municipality granting aid by way of bonus, or authorizing the issue of debentures to the company, shall deposit the same with the provincial treasurer, or in one of the chartered banks, to be withdrawn upon such terms and conditions as may be mentioned in the by-law, or in the agreement entered into between the council of such municipality and the directors of the company.

It seems very clear to me that whatever powers, as to making agreements with the railway company as to the terms on which a bonus should be granted, were possessed under the first Act, equally apply to the aid granted under the second Act, under which a portion only of the county is chargeable with the rates for the redemption of the debentures.

In both cases the debentures are those of the county.

Full powers are given, in my judgment, to both the contracting parties, the municipality and the railway company, to agree on the terms on which the aid is to be granted to the latter.

It would be most unjust to interfere with any lawful bargain fairly entered into, on the faith of which alone the company obtained the desired aid.

If a railway company make an improper or improvident bargain, I can understand their asking for relief in certain cases, and to be allowed to rescind it, giving up the material consideration which they had received for making it.

But here it is urged that they can retain \$65,000 of the money of this county, and refuse to perform their share of the bargain.

As to providing the two stations on their own line for the accommodation of the people who have to pay this money, it seems difficult to imagine any valid objection to it.

As to the clause for equal privileges to the three named lines, it also seems fair and reasonable.

Mr. Bruce argued chiefly on the agreement to procure the Grand Trunk to place a station at a named point.

It is quite true that the defendants cannot compel this to be done. It is equally true that there may be nothing whatever unlawful in their covenanting to pay \$20,000 to the plaintiffs should they fail in having it done. It is a mere question of money payment. It is not uncommon to find one man contracting to get another to execute a conveyance or to do some act, the performance of which he cannot compel. If he fails to do it, he has to pay damages, or the sum agreed to be paid on default.

I cannot understand the argument that this railway company can take the money of others given to them on their solemnly contracting to do certain perfectly lawful acts, and then say that they may hold the money absolved from all liability for breach of their contract.

I do not feel it necessary to discuss the well known cases on the subject of *ultra vires*, quoted by Mr. Bruce.

*Judgment for plaintiffs.*

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HILARY TERM, 40 VICTORIA, 1877.

*From February 5th, to February 17th.*

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*Present :*

THE HON. JOHN HAWKINS HAGARTY, C. J.  
“ “ JOHN WELLINGTON GWYNNE, J.  
“ “ THOMAS GALT, J.

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STUBBS V. BRODDY ET AL.

*Landlord and tenant—Agreement for lease—Present demise—License—  
Evidence.*

On the 1st October, 1875, plaintiff wrote to D., the owner of certain land, in the township of Caledon, that he understood that one M., who had had a written lease from D., which had expired, but who had remained on on the terms of the lease, was going to leave, and that if the farm was for rent he would give D. \$100 a year, and pay all taxes, &c., and requesting an answer by return mail, as he wished to commence ploughing. D., who was then in the United States, replied that he had no objection to plaintiff's terms as to renting the farm; and that he might commence to plough on the following conditions: "I rent to you for one year, with right to sell the farm at any time, you giving up possession thereof when required, on your being paid for labour and seed at valuation, should the purchaser wish possession. I will be up at Caledon as soon as I get home, and make final arrangements as to payment and security." The plaintiff entered and did the ploughing, but without M. having given up possession, or without the arrangements as to payment and security being perfected. Subsequently D. sold to the defendant, who thereupon took possession. It appeared that D. offered to pay the plaintiff for his fall ploughing, but that he did not send in any claim. Evidence was also given of expressions made use of by D. to intending purchasers, referring to plaintiff as the tenant who had the place for a year, but would give up possession on being paid for his ploughing, and as the outgoing tenant who would have to be paid for the ploughing:

*Held*, that there was no present demise, but that the plaintiff merely had a license to enter and plough, pending the conclusion of the proposed bargain, which license was revoked by the entry of defendant, the owner of the fee.

Remarks as to plaintiff's conduct in bringing actions of trespass and ejectment on the same day.

TRESPASS: *quare clausum fregit*, to lot 44 in the 1st concession east of Hurontario street, in the township of Caledon.

Pleas: 1. Not guilty. 2. That the land was not the plaintiff's. 3. *Liberum tenementum*.

Issue.

The cause was tried before Moss, J., without a jury, at Brampton, at the Fall Assizes of 1876.

It appeared that John Dunlop, who was the owner of the land, on 16th June, 1866, leased it by deed to Peter McGrimmon. *Habendum*, as to the tillage land, for seven years from 1st November, 1866; and as to the houses and pasture, from 1st April, 1867, at a fixed annual rent for the whole, with an agreement for giving up the land if sold by the owner. The seven years for the tillage would expire on the 1st November, 1873, and for the houses, &c., on the 1st April, 1874.

McGrimmon proved that he continued after the end of that term under a verbal agreement just as he had been under the lease, except at a reduced rent. He did no fall ploughing in 1875, but remained in possession till January, 1876.

On 1st October, 1875, the plaintiff Stubbs wrote to Dunlop: "I understand from Mr. McGrimmon that he is going to leave your farm, lot 14, 1st concession, East Caledon. If this be the case, and the farm is for rent, I will give you \$100 a year, and pay all taxes, and do all road work that may be against said lot during my term, you allowing me rough timber, or lying timber for firewood. Please answer by return mail, as I would like to start to plough."

Dunlop replied from a place in the United States, 11th October, 1875: "Your letter of the 1st October was forwarded to me here. I have no objection to the terms you propose as to renting the farm, and you may commence to plough on the following conditions, viz.: I rent to you for one year, with the right to sell the farm at any time, you giving up possession thereof when required, on you being paid for labour and seed at valuation, should the

purchaser wish possession. I will be up at Caledon as soon as I get home, and make final arrangements as to payment and security."

On 22nd December, 1875, Dunlop conveyed in fee to the defendant Broddy.

The plaintiff swore that he was in possession from October till 25th December: that in the middle of December the defendant forbade his going on the place, but he remained till 25th December, when the defendant went into possession.

The plaintiff explained that he commenced ploughing as soon as he got Dunlop's letter: that McGrimmon was in possession of the house with his family all the time; and that he gave up possession of the land to the plaintiff.

McGrimmon denied this; but said he told the plaintiff he was going to leave.

The plaintiff made firewood on the place. He did not seem to have seen Dunlop after the receipt of the letter.

*Samuel Stubbs* said, that he saw Dunlop when he came up, and told him the plaintiff was ploughing. He spoke of sending down an agreement: that there would be nothing particular in it, except what was in the letter: that he would want security for the rent. Witness asked would his father do, and Dunlop said yes. He was to send an agreement, and the father was to be the security.

One *Packsmith* swore, that, wanting to buy the place, he went to Dunlop, who said that if he bought he would get possession by paying the man for his fall ploughing, and said the tenant had it for a year, but would give up on being paid for his ploughing.

A letter from Dunlop to one Payne was put in by the plaintiff, dated 6th December, 1875, mentioning the price at which he would sell, adding, "the outgoing tenant will have to be paid some fall ploughing."

On the 22nd December Dunlop's lawyer sent a written notice to the plaintiff forbidding him to cut timber or trees, and notifying him that Dunlop had sold.

On the 29th December, the plaintiff wrote to Dunlop:

“In reference to the place I had from you, Mr. W. Broddy of Brampton was here on the 24th inst., and stated that he was instructed by you to forbid me to put another foot on the place: also used all sorts of intimidation and threats so as to influence me to give up the farm as it now stands, losing all my labour, and glad to get off with that: also accused me of giving wood to the neighbours out of the bush. I have some wood cut on the place and he forbid me to burn any more of it. I was down in Toronto in November last to buy the farm, and was informed by Mr. Hoskin that the place was sold to Mr. Broddy. Now if Mr. Broddy wants possession of the place I wish to be quietly dealt with for my labour. I do not expect it is Mr. Broddy I have to settle with. He says there is more damage done to the place than my labour is worth. I expect you are the man I have to settle with, and if you shew me any damage done to the place I will pay your expenses down. You will please let me know at once, as there is considerable labour done on the place. \* \* I consider myself still in possession, until settled with for my labour.

*Dunlop* swore, that *McGrimmon* was his tenant up to April, 1876, and that the yearly rent was payable in January: that he had neither assented or refused to accept the father as security: that the agreement in the letter was never carried out: that he had sent word to the plaintiff that he was prepared to pay him for the ploughing, but the plaintiff had never sent in any claim: that the plaintiff's lease was to begin 1st of April, but as to tillage 1st of October.

The defendant *Quinn* proved that he asked the plaintiff for his bill for ploughing. He went with the defendant Broddy to the plaintiff, and the defendant asked him had he any claim against him, Broddy, or witness. The plaintiff said no, but that he had a claim on the farm. The defendant told him he must look to *Dunlop*.

*Quinn* was made a defendant, having taken possession in January of the house when *McGrimmon* left.

The learned Judge was of opinion that a present demise was created, and he entered a verdict for the plaintiff.

In Michaelmas term, September 5th, 1876, *J. H. Cameron*, Q.C., obtained a rule *nisi* under the Law Reform Act to set aside the verdict entered for the plaintiff, and enter a verdict for the defendants.

During the same term, November 30th, 1876, *McMichael*, Q. C., shewed cause. The letters constituted a valid agreement for a lease: they state the amount of the rent, and the duration of the term, and the plaintiff enters into possession under it. The cases shew that the agreement will be construed as a demise, although intended to be followed by a formal instrument, where, as here, possession follows. The proper construction is, that there was a present demise, with a condition as to security which was to be subsequently provided: *Chapman v. Bluck*, 4 Bing. N. C. 187; *Rollason v. Leon*, 7 H. & N. 73; *Hayward v. Haswell*, 6 A. & E. 265; *Woodfall on Landlord and Tenant*, 10th ed., 153. The case of *John v. Jenkins*, 1 C. & M. 227, relied upon by the defendants, is clearly distinguishable: there, besides the stipulation as to the defendant finding security, the amount of rent was to be fixed by valuation, and the tenant did not enter into possession.

*Robinson*, Q. C., contra. This case cannot be distinguished from *John v. Jenkins*, 1 C. & M. 227, where it was expressly held that the security was a condition precedent to the tenancy being created. All that Dunlop said, was, that the plaintiff might go on and plough until arrangements should be made as to payment and security. Dunlop expressly states that he did not intend to lease to the plaintiff, as he did not consider he had the power to do so, for McGrimmon's lease did not expire till April, and his lease extended to the whole land: *Kyle v. Stock*, 31 U. C. R. 47; *Woodfall on Landlord and Tenant*, 10th ed., 152. Also, there was no time fixed for the payment of rent, and this

is necessary to a valid demise: *Nesham v. Selsby*, 13 Eq. 591, 7 Ch. App. 406; *Hersey v. Giblett*, 23 L. J. N. S. Ch. 818, 18 Beav. 174; *Davis v. Jones*, 25 L. J. N. S. C. P. 91. 17 C. B. 625; *Redman* on Landlord and Tenant, 71-2, There never was any complete agreement for a lease: *English and Foreign Credit Co. v. Arduin*, L. R. 5 H. L. 64. As to the plaintiff's being in possession, McGrimmon swears that he never gave up possession to the plaintiff. The plaintiff had at most merely a license to enter, and this was revoked by the deed to Broddy.

February 5th, 1877. HAGARTY, C. J., delivered the judgment of the Court.

We are unable to see on the evidence that the plaintiff can recover against the defendants. On the face of the letters I do not think a tenancy is created. It seems clear that something remained to be done, and that the final bargain was never made. Dunlop was to have security, and this was never given to him, and I see no evidence of his having waived it. The fair result of the evidence seems to be, that, pending the final bargain, the plaintiff might at once commence ploughing. The plaintiff's letter speaks of his coming up "to make final arrangements as to payment and security." Without any further communication the plaintiff commenced ploughing.

It seems to amount merely to a license to enter and plough, pending the conclusion of a proposed bargain.

We feel it impossible to consider that a tenancy was forthwith created. McGrimmon was in possession of the house and pasture for an unexpired term. It is true the tillage land was free from 1st October. But it is not pretended that the plaintiff merely offered or was accepted as tenant for tillage alone. His rent would be for the whole place at one sum. No time of payment is mentioned in the letters.

If we hold the tenancy was actually created, what would be the terms of payment? When, if ever, would the right of distress accrue?

We are not disposed to place any weight on the expression in Dunlop's letter about "the outgoing tenant."

The law is well illustrated by the cases cited of *John v. Jenkins*, 1 C. & M. 227, and *Chapman v. Bluck*, 4 Bing. N. C. 187.

In the former, though the agreement contained words of present demise, yet as the amount of rent was to be settled by valuation, and the tenant was to find sureties, it was held not to operate as a lease or alter the terms of an existing tenancy between the parties.

Bayley, J., considered that the agreement by the tenant to give sureties was very important to shew that it was not intended to operate as a lease at all events.

In the latter case Tindal, C. J., points out that an instrument may operate as a demise, notwithstanding a stipulation for the future execution of a lease. He adds, at p. 192, "We may look at the acts of the parties also; for there is no better way of seeing what they intended than seeing what they did, under the instrument in dispute."

In the case before us the landlord uses the words, "I rent to you for one year." These are in a sense words of present demise, but they must be read with the rest of the words; and we must also look at the then position of matters. Another person was still in possession of a large portion, including the residence and buildings on the farm so to be rented. The landlord was abroad, but announces that he will be at the place soon, and "make final arrangements as to payment and security." He authorizes the plaintiff to commence ploughing, as the latter was anxious not to lose the season.

Now, what the plaintiff did was not like the ordinary taking possession of a demised farm. It was merely a commencement to plough upon it. He did this without further communication with the landlord. He was certainly aware that if the place were sold, he must give up possession when required, on being paid for his labour, &c. The learned Judge found that the plaintiff did not pretend to claim to remain, if paid for his labour.

We think it shewn that there was no real difficulty on that head. He was asked for his statement of claim, and we infer that Dunlop was prepared to pay it.

The plaintiff's case then rests on his alleged right to hold till payment or tender.

We cannot but hold that he was at best but a licensee, and that the license was revocable, and was revoked by the entry of the freeholder.

We do not see how, in this view, it was anything but a mere license. If it was coupled with an interest in the land, then we come back to the main question, whether an interest was given. A license merely to enter to do fall ploughing would be fully satisfied by the performance of the work. All intended to be done was fully done before the entry of the defendants. Therefore at the time of entry there was no existing interest in the plaintiff.

In this view we merely regard it as Dunlop saying or writing to the plaintiff, "Pending our coming to an arrangement to grant you a lease, you may commence fall ploughing on the land, as you say the season is getting late."

We are not called on to decide whether if Dunlop refused afterwards to give a lease, the plaintiff could recover the value of his labour or not.

As is said in the leading case of *Wood v. Leadbitter*, 13 M. & W. 838, that every license is and must be in its nature revocable, as long as it is a mere license. Where it is connected with a grant, there it may, by ceasing to be a naked license, become irrevocable, but then it is obvious that the grant must exist independently of the license, unless it be a grant capable of being made by parol, or by the instrument giving the license.

As already remarked, if the instrument here actually made the grant, *i.e.*, the tenancy, there is an end of this part of the defence.

The state of the record is remarkable. Issue is taken on *liberum tenementum*, and there is no replication setting up the alleged tenancy.

We fully concur with the remarks of the learned Judge

as to the unnecessary and vindictive conduct of the plaintiff in bringing not only this action, but an ejectment also on the same day (a).

The rule will be absolute to enter a verdict for the defendants.

*Rule absolute.*

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IRVING V. MORRISON.

*Architect—Claim for services—Loss sustained by plaintiff's negligence—Right of defendant to deduct.*

In an action by the plaintiff, an architect, on the common counts for services in preparing plans and superintending the erection of a house for defendant.

*Held*, that defendant was entitled to deduct from the amount which the plaintiff could otherwise claim any loss which defendant had sustained through the plaintiff's negligence, in certifying for too much for contractors who afterwards failed, in consequence of which defendant was compelled to have the work done by others at a much higher price.

THIS was an action brought by the plaintiff, who was an architect in the city of Toronto, to recover a sum claimed as due for fees for preparing plans and specifications, and superintendence of the erection of a house for the defendant.

The declaration was on the common counts, and by the particulars of claim the balance claimed was \$910, after giving credit for \$350 received on account.

The pleas were: 1. Never indebted. 2. Payment.

3. A special plea, on equitable grounds, stating that the plaintiff had agreed with the defendant that he would not grant certificates for a larger amount than 85 per cent. of the work done; and that in violation of that agreement he had granted certificates for much larger sums than were due, whereby the defendant was injured.

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(a) The Court of Queen's Bench, in which the action of ejectment was brought, concurred in, and followed the above judgment, and entered a verdict for the defendants.

4. That the plaintiff did not superintend the erection of the house, by reason whereof the defendant was obliged to obtain the services of another architect.

5. On equitable grounds: that the plaintiff agreed not to accept any tenders for the erection of the house without obtaining security from the person whose tender was accepted; and that in violation of that agreement he did accept a tender without taking security, whereby the defendant was injured.

There were also two pleas added at the trial, but these need not be specially referred to, as they in effect repeated the defence already raised by the third plea.

Issue was joined on these pleas.

The cause was tried before Hagarty, C. J., without a jury, at Toronto, at the Fall Assizes of 1876.

From the evidence it appeared that the plaintiff was employed by the defendant to prepare plans and specifications, and to superintend the construction of a house. The estimated cost of the house was \$25,000, on which the plaintiff claimed to be entitled to recover a commission of five per cent., amounting to \$1,250; also to a further sum of \$10, paid for advertising. The amount of these charges was not disputed.

It was also shewn on affidavits filed on this application, and which was not disputed, that this commission of five per cent. was divided as follows:—Two and a-half per cent. for plans and specifications, one and a-quarter per cent. for detail drawings, and one and a-half per cent. for superintending the building.

The work was not let to one contractor, but was divided.

Among these contracts was one made with certain persons of the name of Wright, for the execution of all the carpenter and joiner work, iron work, and other works connected therewith, for the sum of \$5,500.

By the terms of this contract the defendant agreed to pay for the said work the said sum of \$5,500, in the following manner: at the rate of eighty-five per cent. as the work progressed, and the remaining fifteen per cent.

within one month after the whole work was satisfactorily completed.

After this contract had been signed, the contractor entered upon the execution of the work, and from time to time received certain sums from the defendant upon the certificates of the plaintiff, amounting in all to the sum of \$2,950. The contractor then abandoned the work, which was afterwards completed by the defendant himself at a sum largely in excess of the original contract. This was done by days' work, under the superintendence of a foreman employed and paid by the defendant.

At the trial it was asserted by the plaintiff that the certificates given by him were not in excess of eighty-five per cent. of the value of work actually done. It was on the other hand contended that not only was the money paid under the certificates of the plaintiff a payment in full for the work done, but was actually more than the work was worth.

There was a great deal of conflicting evidence on this point, and at the end of the trial the learned Chief Justice was of opinion, and so expressed it, that when the Wrights left the work, not more than one-half of this work was done.

The learned Chief Justice entered a verdict for the defendant.

In Michaelmas term, November 23rd, 1876, *Tilt* obtained a rule *nisi* to set aside the verdict entered for the defendant, and to enter a verdict for the plaintiff for \$910, pursuant to the Law Reform Act, on the ground that the said verdict was against law and evidence, and that the defendant shewed no defence to the plaintiff's claim in this action, and that the plaintiff was entitled to recover the amount of his commission on the contractor's work, amounting to \$275.

During the same term, December 1st, 1876, *McMichael*, Q. C., and *J. B. Clarke*, shewed cause. The evidence shews that through the plaintiff's negligence, even if he was not guilty of fraud and misrepresentation, the defendant not

only derived no benefit from the plaintiff's services, but was subjected to loss, the plaintiff having certified for more work than was done. The cases are clear, that where no beneficial interest is derived from the service, there can be claim for remuneration : *Upsdell v. Stewart*, 1 Peake 255 ; *Chapman v. De Tastet*, 2 Stark. 294 ; *Money Penny v. Hartland*, 1 C. & P. 352 ; *Baker v. Milward*, 9 Ir. C. L. R. N. S. 514 ; *Farnsworth v. Garrard*, 1 Camp. 38 ; *Add. on Contracts*, 7th ed., 664-7.

*Hector Cameron*, Q. C., and *Tilt*, contra. The evidence shews that the plaintiff did not certify for more than the eighty-five per cent. Both the plaintiff and Wright state that the certificates were not in excess of the eighty-five per cent. The plaintiff is entitled to recover the value of his services on a *quantum meruit*. The defendant cannot make any deduction, as it is an attempt to set off a claim for unliquidated damages for the plaintiff's negligence, and this can only be the subject of a cross action ; at all events defendant can only deduct the amount of plaintiff's commission for superintendence, and not for drawing the plans : *Cutter v. Powell*, 2 Sm. L. C., 7th ed., 1 ; *Chitty on Contracts*, 11th Am. ed., 813 ; *Templer v. McLachlan*, 2 B. & P. N. R. 136 ; *Sheels v. Davies*, 4 Camp. 119 ; *Best v. Hill*, L. R. 8 C. P. 10 ; *Georgian Bay Lumber Co. v. Thompson*, 35 U. C. R. 64 ; *Kennedy v. Bown*, 21 Grant 95.

February 5th, 1877. GALT, J.—In *Baker v. Milwards*, 8 Ir. C. L. R. N. S. 514, which was an action brought by a parliamentary agent to recover his charges for obtaining a private Act of Parliament, Ball, J., in delivering the judgment of the Court, says, at p. 518 : “ It is to be observed that the general principle on this subject is now well established, that, whenever a special contract remains open, that is, whenever something which the plaintiff ought to have done remains unperformed by him, he cannot sustain either a special action on the contract, or an action of *indebitatus assumpsit*, in respect of anything which he may have done in alleged accordance with it. \* \* However, there is an

exception to this general rule (now equally well established), which appears to have been first acted on by Lord Ellenborough, in the Court of King's Bench in England, in the case of *Basten v. Butter*, 7 East 479 ; which is this, that where some benefit has accrued to the defendant, and been accepted by him, by reason of the plaintiff's part performance of the special contract, the former is not at liberty, in bar of the action, to rely upon the non-performance of the entire of what the plaintiff has bound himself to do ; but he may give in evidence such non-performance on the part of the plaintiff, in reduction of the damages which would otherwise have been recoverable." Many of the cases cited on the argument are referred to in this judgment.

In *Money Penny v. Hartland et al.*, 1 C. & P. 352, Abbott, C. J., held that if a surveyor makes an estimate for work which turns out to be incorrect to a considerable amount, he is not entitled to compensation.

The judgment, at p. 354, is : " If a surveyor, who makes an estimate, sues those who employ him for the value of his services, and it appear that he was so negligent, that he did not inform himself, by boring or otherwise, of the nature of the soil of his foundation, and it turned out to be bad ; this goes to his right of action : and if he went upon the information of others, which now turns out to be false, or insufficient, he must take the consequences ; for every person, employed as a surveyor, must use due diligence. Whether the plaintiff has used due diligence or not, is a question for the jury ; and if the plaintiff went on the statements of others, that is no excuse, as it was his duty to ascertain how the fact was, or to report to his employers that he only went on the information of others, or that the fact was uncertain." The plaintiff was nonsuited.

In the following term the plaintiff moved to set aside the nonsuit, on the ground that the plaintiff, having made the plans, &c., was entitled to be paid for them ; and that if any undue expense had fallen on his employers by his want of care, he was liable to an action for damages ; but it was held by the Court that if persons in the position of the plaintiff make estimates, and do not use all reasonable

care to make themselves informed, they are not entitled to recover anything.

The case cited by Mr. Cameron of *Best v. Hill*, L. R. 8 C. P. 10, does not apply to this case, for the reason that in that case it was admitted that the defendant was indebted to the plaintiff in a sum of money for advances made, and acceptances given, and what was attempted to be done was to set off a claim for unliquidated damages, arising, as was alleged, from negligence on the part of the plaintiff in transacting the business of the defendant, which the Court held could not be done.

The result of the authorities is, that where an action is brought on a *quantum meruit* for services, the defendant is entitled (as was suggested by the learned Chief Justice on the argument of this case), under the plea of never indebted, to shew that he has derived no benefit from the services of the plaintiff; and, if so, it appears to me that he can also shew that he has sustained loss owing to the negligence of the plaintiff, which should be deducted from any amount which would otherwise be payable to him.

The decision of this case, acting on the principle that in an action of this kind the defendant is entitled to deduct any loss which he has sustained through the default of the plaintiff, is reduced to one of figures.

The plaintiff was entitled (if the work had been properly superintended by him), to a sum, including advertising, of .....		\$1,260 00
He had received on account.....		350 00
Balance of claim .....		<u>\$910 00</u>
Work done by Wrights on the contract.....		\$2,600 00
Extra work .....		\$100 00
		<u>\$2,700 00</u>
Less 15 per cent .....		405 00
		<u>\$2,295 00</u>
Due Wrights.....		\$2,295 00
Amount paid to Wrights.....		<u>2,950 00</u>
Over paid .....		\$655 00
This \$655 should therefore be deducted from the plaintiff's claim.....		<u>\$255 00</u>

At the trial, when the Chief Justice entered a verdict for the defendant generally, he did so as if the contract of the plaintiff to draw plans and superintend the work had been a separate and distinct contract from the rest of the building; and then, on the authority of *Money Penny v. Hartland*, if such had been the case, the decision was unquestionably right. But we are of opinion that the contract was an entire contract for the construction of the house, as respects the plaintiff, and therefore that the loss sustained on a part should be deducted from the whole.

The rule will therefore be absolute to enter a verdict for the plaintiff for \$255, with costs of suit.

HAGARTY, C. J.—I think we must dispose of this case as if to the common counts never indebted alone is pleaded.

It is a claim for work and labour, services as an architect in planning and superintending the erection of the defendant's house. Amongst the plaintiff's duties was, the certifying for payments to the contractors employed, in certain fixed proportions to the value of the work done.

I think it was very clearly proved that in consequence of the plaintiff's failure to perform his duty in this respect, a large amount was overpaid on the carpenter's and joiner's contract: that on the failure of these contractors, the defendant was compelled to have their work finished by others at a much higher price, and thereby the defendant wholly lost the amount which he had overpaid to the failing contractors on the plaintiff's certificate, which ought not to have been given.

If everything had proceeded without default, the plaintiff would have been entitled to a fixed commission or percentage on the whole contract price.

It is always open, in actions like this, as I understand the law, to prove under never indebted, either a total failure of consideration, by the defendant having, through the plaintiff's default, derived no benefit whatever from his services, or a partial failure in mitigation of damages.

Where the loss is sharply defined to a specific sum, as

here, by the plaintiff's failure in performing his contract, I can see no reason why a jury might not fairly reduce his demand for damages by that sum.

The law would be very defective if a defendant were driven to a cross-action for negligence, instead of getting the substantial benefit of his defence, as we propose to give him here. Circuity of action ought not to be favoured.

I think substantial justice will be done between the parties by giving the plaintiff a verdict for his unpaid claim, less this amount lost to the defendant by his conduct in the premises.

GWYNNE, J., concurred.

*Rule absolute.*

### HUTCHINSON V. COLLIER.

*Sale of land for taxes—Proof of taxes in arrear and amount—32 Vic. ch. 36 secs. 130, 155, construction of.*

In ejectment under a tax deed plaintiff, to prove the taxes being in arrear, produced the treasurer's books containing such entry: *Held*, sufficient *prima facie* evidence.

*Held*, also, that the recital in the tax deed, and the advertisement in the *Gazette*, was sufficient evidence of the amount of taxes due, but not of the warrant to sell.

*Held*, also, that sec. 130 of 32 Vic. ch. 36, O., does not dispense with proof of the warrant or cast the burden of negating its existence on the objector to it.

*Held*, also, that under sec. 155 the two years, after which the deed is made valid, must elapse after the execution of the deed and not from the time of sale.

EJECTMENT for part of the west half of the east half of lot No. 19, in the second concession of the township of Brock.

The plaintiff claimed by deed from R. H. Munro, who claimed under deed from the warden, &c., of the county of Ontario, dated 22nd December, 1874.

The defendant claimed by twenty years' possession, and also under a paper title.

The cause was tried before Patterson, J., without a jury, at Whitby, at the Fall Assizes of 1876.

The action was commenced on the 29th April, 1876.

A deed was proved, dated 22nd December, 1874, from Phillip McRae, warden, and William Laing, treasurer of the County of Ontario, to R. H. Munro, of the land in question.

It recited that under a warrant under the hand of the warden and the seal of the county, one Peter Taylor, the then treasurer, did, on 28th October, 1873, sell by auction these lands to Munro for \$1,830, to pay arrears of taxes alleged to be due thereon, to 31st December, 1872: that Peter Taylor died in January, 1874, and William Laing was appointed treasurer, &c. Then it conveyed to Munro, &c. This deed was registered 5th January, 1875.

Munro proved that he bought the land at the tax sale, on the 28th October, 1873.

On 30th March, 1875, Munro sold to the plaintiff, taking back a mortgage, produced. This mortgage was assigned on the 13th April, 1875, to Mrs. Shaw.

Laing, the treasurer, produced the non-resident roll book. It shewed taxes in arrear for 1870 and 1871, for which the land was sold.

The *Gazette* was put in, with advertisement as follows:—

Brock, east half 19, 2nd concession, 100 acres; taxes, \$18.30; costs, \$1.43; total \$19.73; and also the west half of the east half for the same amount of taxes.

The then treasurer's book described it as part of the east half 19, 2nd concession, 50 acres, \$7.64 for 1870, with percentage \$8.40; \$6.13 for 1871, and carried forward as \$18.30, and noted 7 acres sold November 28th.

The sale book entry was west half of east half 19, in 2nd concession, 50 acres—10 acres sold. Another entry, east half of 19 in 2nd concession, 100 acres, of which 7 were sold.

Therefore at the same sale there were sold 10 acres of the west half, and 7 acres of the east half.

The two halves were separately assessed, and separately advertised.

This was the plaintiff's case.

• It was objected for the defendants—

1. That no warrant was proved.
2. That the advertisement in the local papers was not proved.
3. That three years' taxes were not in arrear.
4. That the plaintiff had no right to possession, his mortgage being in default.

5. That the production of the treasurer's book was not sufficient evidence of taxes being in arrear, the proper evidence being the returns from the township. The treasurer's book did not prove the lands were assessed for taxes.

The plaintiff answered that by sections 130, 138, and 155, of the Assessment Act of 1869, all preliminary objections were satisfied after the lapse of two years from the sale, which was in October, 1873, though within two years from the execution of the deed: that the advertisement in the *Gazette* and the recital in the deed sufficiently proved the warrant, and shewed the amount of taxes.

On filing her written consent, the learned Judge allowed Mrs. Shaw to be added as a plaintiff.

This was objected to, as her husband was living. She was wrongly described both in the mortgage and in the consent as a widow.

The defendant gave evidence of a paper title.

The learned Judge found a verdict for the plaintiff, holding that the plaintiff proved all that was necessary for a tax title: that the sale was fairly conducted: that the treasurer's book proved the arrears, and the advertisement, the correct amount due; and that the taxes for 1870 were, in 1873, due for at least the third year: that section 155 applied to support the deed, as it was not questioned within two years from time of sale: that the plaintiff, Mrs. Shaw, was entitled to the land.

In Michaelmas term, November 28th, 1876, *Hector Cameron*, Q. C., obtained a rule *nisi* to set aside the

verdict for the plaintiff, and to enter a verdict for the defendants on the law and evidence, and on the ground that the plaintiff shewed no title, and that Mrs. Shaw, being a married woman, could not sue alone, and the amendment ought not to have been made.

In this term, December 8th, 1876, *M. C. Cameron*, Q. C., shewed cause. The entry in the treasurer's books was sufficient evidence of the taxes being in arrear; and the advertisement in the *Gazette* and the recitals in the deed sufficiently proved the warrant and the amount of taxes due. Sec. 130, of the Assessment Act of 1869, which makes the sale and deed final and binding, unless the land be redeemed within the year, dispenses with the proof of the sale having been legally conducted; at all events, the production of the deed is *prima facie* evidence until rebutted; the burden therefore of negating the existence of the warrant is cast upon the defendant. Under sec. 155, unless the deed is questioned within two years after sale takes place, it is made conclusive. Sec. 138 clearly shews that the advertisement is sufficient evidence of the amount of taxes due: *Jones v. Cowden*, 36 U. C. R. 495; *Silverthorne v. Campbell*, 24 Grant 17; *Bank of Toronto v. Fanning*, 18 Grant 391. As to the objection that Mrs. Shaw was a married woman, so far as appears the property was her separate estate, and for which therefore she was entitled to sue. The amendment at the trial, joining Mrs. Shaw as a plaintiff, was properly made: *Blake v. Done*, 7 H. & N. 465; *Ogilvie v. McRory*, 14 C. P. 557; *Henderson v. White*, 23 C. P. 78.

*Hector Cameron*, Q. C., contra. The warrant should have been produced and proved. Sec. 128 of 36 Vic. ch. 36, provides for the issue of the warrant, and sec. 130 in no way dispenses with the proof of the warrant. Sec. 155 cannot assist the plaintiff, for although it states that the deed must be questioned within two years after the sale, the whole section read together shews that it was intended that the two years should elapse after the execution of the

deed. The cases are clear that, notwithstanding the 155th section, the plaintiff must prove that an actual sale did take place, and that the taxes were due : *Proudfoot v. Austin*, 21 Grant 566 ; *Jones v. Bank of Upper Canada*, 13 Grant 74 ; *Canada Permanent Building Society v. Agnew*, 23 C. P. 200. There was no power in Mrs. Shaw to sue : she could not sue at common law, and her right could only arise under the Married Women's Acts on shewing that she was possessed of separate property within the meaning of those Acts, and there is no such proof here : *McCready v. Higgins*, 24 C. P. 233.

February 5th, 1877. HAGARTY, C. J., delivered the judgment of the Court.

The points chiefly argued before us were, as to adding Mrs. Shaw's name, and as to whether the statute cured all irregularities, the deed not being impeached within two years from the sale.

We think it has been held for many years that the entry in the treasurer's books was *prima facie* evidence of taxes being in arrear.

We must also hold that there was sufficient evidence here of the amount of taxes. Nothing was urged before us against the length of time, that at least a portion was in arrear.

No evidence was given of a warrant to the treasurer to sell. This has always been considered necessary, as the foundation of the authority to sell ; and, as we understand the plaintiff's argument, the want of such proof can only be cured by the legislation of the last few years.. It can hardly be contended that the mention of a warrant in the sheriff's deed, or in the *Gazette*, can prove its existence without legislative aid.

Section 130 of the statute 32 Vic. ch. 36, provides, " If any tax in respect to any lands sold by the treasurer after the passing of this Act, in pursuance of and under the authority thereof, shall have been due for the third year or more years preceding the sale thereof, and the same

shall not be redeemed in one year after the said sale, such sale and the official deed to the purchaser of any such lands, (provided the sale shall be openly and fairly conducted), shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through, or under them," &c.

The preceding section 128, provided for the issue of a warrant under the hand of the warden, and the seal of the county, commanding the treasurer to levy, &c.

We do not see that section 130 dispenses with any proof of the warrant.

Granted that taxes were due for the necessary time, and a sale fairly conducted, we still cannot see how it can be held to be a sale in pursuance of and under the authority of the Act unless there had been a warrant, otherwise the treasurer could sell on his own authority.

Nor can we think that the burden of negating a sale under a warrant is thereby cast on an objector to the title.

The proof of a warrant, either by production or reasonable secondary evidence, could rarely involve any difficulty.

There are many cases in which parties honestly and reasonably believing that they are acting under a statute, are entitled to its protection, notwithstanding that they did not act lawfully under the Act. If they did, they would not have required any protection. But this well known principle cannot, I think, avail in a case like this, where it is sought to make title under a statute. The burden of proof cannot, I think, be shifted on anything contained in this clause 130.

We are then referred to section 155, and it is insisted, that as the sale was over two years unquestioned, although the deed was within that period, all objections are cured.

"Whenever lands shall have been or may be hereafter sold for arrears of taxes, and the sheriff or treasurer, as the case may be, shall have given a deed for the same, *such deed* shall be to all intents and purposes valid and binding, except as against the Crown, if the same has not been questioned before some Court of competent jurisdiction by

some person interested in the land so sold, within two years after the passing of this Act, when the land was sold, and a deed given by the sheriff or treasurer, before the passing of this Act, *or within two years from the time of sale, when such sale shall take place after the passing of this Act.*"

The apparent scope and leading idea of this clause seems clearly to be, to give conclusive force to a deed, unless questioned within two years from its existence, and the language is clear for such purpose as where the sale and the deed had preceded the Act.

The difficulty is created in the last clause, "or within two years *from the time of sale*, when *such sale* shall take place after the passing of the Act."

The introduction of the words "and giving of deed" after the words "time of sale," would make the whole clause consistent.

We have not the slightest doubt that the Legislature so meant it, and that an injustice so startling could never have been designed as that a sale, unquestioned for two years, though the deed may have only been executed for a month before action, was intended to be conclusively made valid.

If two years of such alleged existence is to be sufficient in the one case, it is difficult to conceive why a totally different rule should apply in the other.

The section expressly professes to legislate for the case of lands that "*shall have been or may be hereafter sold.*"

There may have been an unauthorized sale—so notoriously irregular that no one could anticipate its being further acted upon—a deed could be given after two years, and an action instantly brought.

We cannot believe that it was intended to make such a deed conclusive against the true owner.

Construed literally, perhaps even a deed given after redemption within the year from sale, might be claimed to be conclusive after two years from sale.

The Assessment Act of 1866, (29 & 30 Vic. ch. 53, sec.

156), has a somewhat similar provision. Where the deed was given before the Act it was made good, if not questioned in four years after the passing of the Act, "or within four years from the giving of such deed, when such sale shall take place or deed be given after the passing of this Act."

It would seem that in the assessment law subsequently passed, sec. 155, the same principle was intended to prevail, shortening the limitation from four years to two.

We may refer to *Maxwell* on Statutes, ch. 9, p. 207, *et seq.*, and the cases collected there.

In *Becke v. Smith*, 2 M. & W. 195, Parke, B., says, at p. 165: "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."

In *Perry v. Skinner*, *Ib.* 471, the same very learned Judge says, at p. 476: "The rule \* \* is, to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the Legislature should be done."

See also Lord Tenterden's language in *Simpson v. Unwin*, 3 B. & Ad. 134.

The famous rule as to construction of statute given by Plowden, may be found quoted with great approval by the Lord Justices in *Hawkins v. Gathercole*, 6 DeG. McN. & G. 1. It is a passage that has been quoted more than once at length in our reports.

The judgments of Knight Bruce and Turner, Lords Justices, very fully explain the general principle of construction.

In the view we take of this deficiency in the proof, we do not deem it necessary to discuss the question whether the married woman can be properly made a sole plaintiff.

The objection may be serious, but we express no opinion on it.

We think a verdict should be entered for defendant.

*Rule absolute.*

### KEFFER V. KEFFER.

*Statute of Limitations—Tenancy at will—Subsequent determination of and creation of fresh tenancy—Mortgage—38 Vic. ch. 16, O.*

In ejectment it appeared that in March, 1859, the plaintiff told his son, then over 22 years of age, and married, and who had up to that time lived with and assisted the father, to go and live on a certain fifty acres of the lot, the land in question, which had been previously measured off and was wild, and make a living there. The son accordingly entered into possession, cleared nearly all, erected two dwelling houses and a barn, &c., on it, expending some \$500 of his wife's money in so doing, and had lived on it ever since, the land being assessed in his name and the taxes paid by him; without any demand of possession ever having been made by the father, or any claim for rent until about a week previous to 1st July, 1876, when the son refused to pay anything claiming the land as his own. The father stated that he intended it to be the son's after his death, though he did not so inform him: while the son stated that he entered under the expectation and belief that it was to be his, and would not otherwise have done so.

It also appeared that in February, 1865, the son, wishing to raise some money on the land, procured his father to execute a mortgage on it for \$550, for his, the son's, benefit, he receiving the amount and undertaking to pay it off, which he did, together with the yearly interest as it accrued due, and on the 30th January 1871, the mortgage was discharged. There was no evidence of any communication between the son and the mortgagee.

In September, 1876, this action was commenced.

*Held*, the case having been tried without a jury, that, as a matter of law, the son became upon entry tenant at will to his father, so that the statute began to run in a year from that time: that, as a matter of fact, when the mortgage was executed, neither father or son intended thereby to make any change in the nature of the son's possession, or to create any new tenancy, for which there was no necessity in the interest of the mortgagee: that the existing tenancy at will therefore was not thereby determined, nor any new tenancy at will created: that even if it had been so created, the statute would have begun to run again in February, 1866; and that the plaintiff therefore suing after ten years was barred under the 38 Vic. ch. 16, O.

*Foster v. Emerson*, 5 Grant 135, *contra*, commented upon, and not followed.

EJECTMENT to recover possession of the north-east fifty acres of lot No. 10, in the 3rd concession of the township of Vaughan.

The plaintiff, who was the father of the defendant, George Keffer, brought this action for the purpose of evicting his son and his son's tenant from the possession of the said north-east fifty acres.

The cause was tried before Hagarty, C. J., without a jury, at the Toronto Fall Assizes of 1876.

According to the plaintiff's own evidence, he, being seised of the whole lot, in or about the month of March, 1859, told his son George—who was his eldest son, and who had married in the year 1856, and who, before his marriage, had lived with his father until he was twenty-two years and three months old, and had worked for his father in bringing into cultivation that part of the lot upon which the old man and his family lived—that he might go upon the fifty acres in question in this action, which was then quite wild; and that he might live there and make a living for himself. The fifty acres had been measured off before this. Accordingly the son George went upon the lot and cleared it, and brought all of it, excepting about six or seven acres, into a good state of cultivation. He had erected upon it two dwelling-houses, a barn, a stable, and driving-shed; and George and his tenants had ever since lived upon the lot.

The plaintiff also said that when he so put his son in possession of the fifty acres, his intention was, to let the son have it as his own property after his (the father's) death, but that he did not communicate this intention to the son. However, he said that during all the time that the son was living on the fifty acres, he was on it as if it was his (the son's) own: that it was assessed to him, and that he paid the taxes; that he, the plaintiff, never asked the defendant or his tenant to give up possession to him; that the son did not, nor did any tenant of his, pay the plaintiff any rent; and that in fact the plaintiff never asked for any rent until about a week before the 1st of July, 1876, when the son refused to pay anything, claiming the land as his own.

The defendant said that in the spring of 1859, his father told him that he might go on the fifty acres, and that he

might do the best he could with it: that the defendant thanked his father, and immediately set to work and put up a house, and went to live on the land in the fall of the year: that he, the defendant, lived on the lot, cleared it, and, as he said, spent \$500 of his wife's money in making improvements upon it: that he considered the land was his own; and that if he had not considered it was to be his own, he never would have gone on it, or improved it.

The defendant further said that, being in debt, and desiring to raise money upon the land, he went to his father and explained to him all his circumstances, and asked him to give him a deed for the fifty acres that he might raise upon the security of the land the money he wanted: that the father refused to give the deed, saying he was afraid the son would lose the land if he did; but, that, being appealed to by the son a second time, he consented to raise the money by executing a mortgage upon the fifty acres himself, which he did, bearing date the 21st day of February, 1865: that he, the defendant, received the money, viz., \$550 raised upon that security, and undertook to pay off the mortgage, and did so. The principal was made payable by the mortgage on the 21st February, 1870, and the interest in the meantime yearly.

The plaintiff said, in his evidence, that the son did not ask him to give him a deed, but he admitted that he executed the mortgage, and that the son received the money and paid off the mortgage, and that the plaintiff was never called upon to pay any part of it.

The mortgage was discharged upon the 30th January, 1871.

The defendant set up the Statute of Limitations, 38 Vic. ch. 16, O., in bar of the plaintiff's right to recover in this action, which was commenced only upon the 23rd day of September, 1876; and in answer to this defence the plaintiff's sole contention was, that the transaction in February, 1865, in relation to the execution of the mortgage, constituted a determination of the tenancy at will originally created: that a new tenancy should be inferred to have

been then created, which it was contended did not terminate until the discharge of the mortgage in 1871; and that therefore the Statute of Limitations, as against the plaintiff's right to recover, commenced to run only from the 30th January, 1871; and in support of this contention the plaintiff's counsel relied upon *Doe dem. Groves v. Groves*, 10 Q. B. 486, and *Foster v. Emerson*, 5 Grant 135.

The learned Judge entered a verdict for the plaintiff.

In Michaelmas term, November 23rd, 1876, *Tilt* obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant.

In the same term, December 1st, 1876, *Read*, Q.C., shewed cause. The son's procuring the father to execute the mortgage, and give a covenant for quiet enjoyment, was a clear admission that the title was in the father, and he is estopped from now setting up that the father had not the title. The mortgage vested the title in the mortgagee, and the discharge to the father constituted a re-conveyance to the father, and re-vested the title in him. There was therefore a determination of the existing tenancy at will, and a new tenancy at will created between the parties. The case of *Doe dem. Groves v. Groves*, 10 Q. B. 486, is expressly in point. See also *Doe dem. Bennett v. Turner*, 7 M. & W. 226, 9 M. & W. 644; *Foster v. Emerson*, 5 Grant 135; *Doe dem. McLean v. Manahan*, 1 U. C. R. 491; *Robson v. Waddell*, 24 U. C. R. 574.

*A. G. McLean* and *Tilt* contra. The evidence clearly shews that the land was a gift from the father to the son in 1859, and the son then entered into possession, and has been in possession ever since. He has clearly, therefore, acquired the title by possession. The mortgage in no way affects his title. It was made by the father for the benefit of the son, and in recognition of his son's right to require it to be made, and the son then paid it off. The intention of the parties must be looked at, and it was to recognize the son as entitled to the possession. The mortgage does not operate as an estoppel. It is not an estoppel by record,

and clearly not an estoppel in pais, as the position of the parties was not altered. The case of *Doe dem. Groves v. Groves*, 10 Q. B. 486, is clearly distinguishable. There, besides the mortgage, there was evidence of the owner in fee residing from time to time on the place, and the mortgage by itself was not held to create a new tenancy between the parties. At all events the defendant is entitled to a lien for his improvements under 36 Vic. ch. 22, O., as he held under a *bonâ fide* belief that he was the owner: *O'Connor v. Dunn*, 37 U. C. R. 430.

February 5th, 1877. GWYNNE, J.—In *Doe Bennett v. Turner*, 7 M. & W. 226, decided in the Court of Exchequer in 1840, it was contended by the Attorney-General, Sir John Campbell, upon the part of the plaintiff, that the true construction to be put upon the 7th section, in conjunction with the 2nd section, of 3 & 4 Wm. IV. ch. 27, was, that, if the will be determined by any act of the lessor, then the twenty years shall be computed from the act done; if not, then they shall be computed from the expiration of the year next after the original commencement of the tenancy. And he contended in the case then in argument, that the original tenancy at will, which had commenced in 1817, was determined by the entry of the lessor in 1827, and he then redemised to the tenant at will, and that therefore the lessor had twenty-one years from that period to bring his ejectment.

Park, B., at p. 232, in giving the judgment of the Court, puts the case thus: "It appeared on the trial, that the lessor of the plaintiff had let the defendant into possession of the land in question, as tenant at will, in the year 1817. In the year 1827, he entered on the land without the consent of the tenant, and cut and carried away stone therefrom. This was undoubtedly a determination of the tenancy at will. \* \* Notwithstanding this determination of the tenancy at will, the defendant continued in possession of the land as before, and the lessor of the plaintiff did not bring his ejectment until the year 1839, being twenty-two years from the time

when the defendant first became tenant at will. The jury found, that during the whole period from 1817 to the bringing of the action, the defendant was tenant at will to the lessor of the plaintiff. \* \* The defendant therefore argued, that the right of the lessor of the plaintiff to bring his action first accrued, according to the provisions of the 7th section, in the year 1818, being one year after the commencement of the tenancy. \* \* It appears, however, to the Court, that this view of the case, *attending to the finding of the jury*, and if that be correct, *and a new tenancy* at will was created in 1827, cannot be sustained. If, indeed, the tenancy throughout the whole period had been one continuous tenancy at will, or if, when the original tenancy at will was determined in 1827, no new tenancy at will had been created, but the tenant had continued to occupy merely as tenant by sufferance, the reasoning of the defendant would be correct. In either of those cases, the right to bring an action, which, by the express provision of the 7th section, undoubtedly accrued to the lessor of the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and not having been exercised during that period would have been barred."

This judgment proceeded upon the finding of the jury being to the effect that a new tenancy at will was created in 1827 ; but the learned Baron, who had himself tried the case, being of opinion that he had not sufficiently drawn the attention of the jury to the effect of the determination of the will being to make a tenancy at sufferance only, which would continue until the parties should create a new tenancy at will by a fresh agreement between them, express or implied, a new trial was granted to the defendant, in which the question for the jury was declared to be, whether a new tenancy at will was created after the determination of the old one in 1827.

Upon the second trial, Gurney, B., before whom the case was tried, stated in his charge to the jury, that the acts of the lessor of the plaintiff, which were in evidence, amounted

to a determination of the defendant's original tenancy at will, and that it was for them to consider whether a new tenancy at will had been created by the parties, and that, if they thought it had, they should find for the lessor of the plaintiff, because such tenancy at will would not be determined under any construction of the statute until 1821, in which case the action was brought in time.

The defendant's counsel tendered a bill of exceptions, which, the jury having found for the plaintiff, was brought up on error into the Exchequer Chamber.

There the facts in evidence appear to have been, 9 M. & W. 644, that the defendant having entered as tenant at will of the plaintiff in 1817, remained in possession without paying rent until the action was brought; but that, in 1820, the parish authorities, wishing to cut a drain through the farm, applied to the defendant for leave, who was not willing that it should be done. They then applied to the lessor of the plaintiff for leave, which he gave, and it was done. In the subsequent years, 1823, 1825, and 1827, stones were dug at a quarry on the farm, by the order of the lessor of the plaintiff, and trees planted by him on the farm at different times. In the year 1829, the defendant, being one of the assessors for the land tax in the parish, signed an assessment in which he was named as the occupier of the farm in question, and the lessor of the plaintiff was named as the proprietor.

Lord Denman, C. J., in giving the judgment of the Court says, at p. 645: "We do not think it necessary to determine what is the true construction of that statute, inasmuch as we are of opinion that the direction of the learned Judge was quite correct, and as the jury found that new tenancy at will was created after 1820, this ejectment was brought in proper time, whatever may be the true construction of the statute."

He then refers to the act done by the lessor's leave in 1820, and the defendant assessing himself in 1829 as occupier, and the plaintiff as proprietor, which was held to be clear evidence to go to the jury of a new tenancy having been created, which was sufficient.

The decision of this case, both in the Court of Exchequer and in the Exchequer Chamber, is based upon the fact that a new tenancy at will had been created within twenty years before action brought, and that but for the creation of such new tenancy, the statute would have barred: that, time having commenced to run one year from the original entry as tenant at will in 1817, would have continued to run uninterrupted until the action was barred at the expiration of twenty-one years from such original entry. And the case establishes that the question, whether or not a new tenancy has been created, is a question of fact to be decided by a jury, not a conclusion of law necessarily following upon the determination of the original tenancy at will, and the continuance of the occupation of the original tenant at will.

In *Doe dem. Stanway v. Rock*, 4 M. & G. 30, A. D. 1842, one Woolrich had entered under an agreement to purchase in 1816, and continued in possession until January 1822, when he died, having devised all his real estate generally to his widow, and she received rent for shambles built on the lands by her deceased husband until her death in 1837; and by her will devised all her real estate equally among her children by a former marriage; and the defendant, one of those children, received rent for the shambles until action commenced on the 8th January, 1842, precisely twenty years from the day on which Woolrich, the husband, was buried. There was no evidence of payment of any rent to the lords of the manor, the land being copyhold, either by Woolrich, his widow, or the defendant; but it appeared that in 1827, the lords of the manor held a rent day and sent a message to Mrs. Woolrich desiring her to come over and pay rent for the premises, and that she sent back word to say that she would come or send over presently, but it was not proved that she either went or paid the rent. It was held that upon this evidence it was properly left to the jury to say whether or not a tenancy at will had been created between the lords of the manor and Mrs. Woolrich; for, if not, it was admitted that the lessor of the plaintiff, who claimed under the lords of the manor, was barred.

In *Doe dem. Evans v. Page*, 5 Q. B. 767, A. D. 1844, and in *Doe dem. Birmingham Canal Co. v. Bold*, 11 Q. B. 127, it was decided that the 7th section of the Act did not apply to tenancies at will which had been determined before the passing of the Act, but only to those in existence after the passing of the Act.

Lord Denman, C.J., in giving judgment in the former case, referring to the language of Parke, B., in *Doe dem. Bennett v. Turner*, says, at p. 771: "It may be, that the effect of this section," namely, the seventh, "is to give a right of entry at the determination of the tenancy at will at any time within a year after its commencement, but, at all events, at the expiration of a year from its commencement; and, consequently, if that section be applicable to the present case, the lessor of the plaintiff is too late, as the tenancy at will of the mother commenced in 1816. \* \* But we are of opinion that the 7th section only applies to cases of tenancies at will existing at the time the Act passed or subsequently."

In that case the tenancy at will had determined by the death of the tenant at will in 1832, before the passing of the Act.

In *Doe dem. Dayman v. Moore*, 9 Q. B. 555, A. D. 1846, it appeared that D., being seised in fee, permitted his daughter J. and her husband to occupy as tenants at will. D. died in 1837, before the expiration of five years allowed by section 15. He devised the lands to J. for life, remainder to W. in fee. J. and M. occupied from 1801 until J.'s death in 1843, no rent being paid after J.'s death, M. continued in occupation. In April, 1844, the plaintiff brought his action against M. The defendant relied upon the Statute of Limitations.

For the plaintiff it was contended that the tenancy at will determined upon the death of D., in 1837, and that a fresh tenancy might be inferred from acts of assent by the reversioner.

To this argument Patteson, J., answered: "If a new tenancy is to be inferred from the mere holding on of the

tenant at will, the statute never could apply at all to tenancies at will."

In *Doe dem. Stanway v. Rock*, 4 M. & G. 30, Tindall, C. J., had already said, at p. 34: "In order to constitute a tenancy at will something must be done by the lessor."

It was also contended for the plaintiff in *Doe dem. Dayman v. Moore*, 9 Q. B. 555, that where there is an actual determination of the tenancy at will, the time runs from such determination, and that the clause as to running from the expiration of one year from the commencement of the tenancy, only applied to cases where no actual determination appeared. To which it was answered that upon this construction the case might be longer in a case of a tenancy at will than in the case of a tenancy from year to year without payment of rent under section 8; and it was contended that the true construction of the 7th section, as to the two points of time therein mentioned, namely, the determination of the tenancy and the end of the first year, was that the section must be read as if the words "whichever shall first happen" were added.

Counsel for the defendant further cited, in support of their construction, the opinion of Parke, B., in *Doe dem. Bennett v. Turner*, whose judgment proceeds upon the assumption that the statute absolutely begins to run at the expiration of one year from the commencement of the tenancy; and also the opinion of Sir Edward Sugden, as expressed in the 11th ed., p. 622, of his work upon Vendors and Purchasers, where he lays it down that the effect of twenty-one years' possession by the tenant at will, is to "vest the fee simple in the tenant at will, for the remedy of the owner will not only be barred, but his estate extinguished," which could only be by the statute commencing absolutely to run against the owner at the expiration of the year from the commencement of the tenancy.

Lord Denman, C. J., in delivering the judgment of the Court, says, at p. 561: "By the seventh section, therefore, coupled with the second, more than twenty years had elapsed since the expiration of a year from the commencement of

the tenancy, and Peter Dayman's right of entry was gone, except so far as it was saved by the fifteenth section, namely, for five years after the 24th July, 1833."

This case, then, was an express authority for what had been contended to be law by counsel for the defendant in *Doe dem. Bennett v. Turner*, and contested strongly by Sir John Campbell upon the part of the plaintiff, and was assumed by the Court to be law in their judgment delivered in that case, which judgment the Exchequer Chamber in no respect disputed or affected.

In *Doe dem. Goody v. Carter*, 9 Q. B. 863, A.D., 1847, Robert Carter, the purchaser of land, was let into possession before execution of a conveyance. He let in his son as tenant at will. The son occupied and built a cottage on the land. Afterwards, the father received a conveyance of the land in December, 1824; and on 23rd March, 1829, mortgaged the premises for a term of years vested in the lessor of the plaintiff. The son continued in possession of the premises paying no rent, until his death in 1834. His widow, the defendant, continued to occupy the premises ever since his death, until action commenced in January, 1845.

The learned Judge directed the jury, that if they believed that John Carter, the son, entered as tenant at will more than twenty years before the day of the demise laid in the declaration, the action was barred by 3 & 4 Wm. IV. ch. 27, secs. 2 and 7. The jury rendered a verdict for the defendant.

Upon a rule to set aside this verdict for misdirection, it was contended for the plaintiff, that the father, by taking a conveyance in 1824, determined the will, and that so the period of twenty years was broken; and it was contended that the judgment in *Doe dem. Bennett v. Turner*, was a decision in the plaintiff's favour. It was further contended that if a tenancy at will subsisted in 1829, the will was determined by the mortgage, and a new tenancy then created.

Lord Denman, C. J., in delivering the judgment of the Court says, at p. 867: "We think that there was abundant

evidence to shew that the defendant's husband, John Carter, entered into possession of all the premises sought to be recovered, as tenant at will to his father, more than twenty-one years before the bringing of this ejectment, which in truth was the only question for the jury." \* \* Again, it was contended that the mortgage by the father in 1829 operated as a determination of the will. Assuming this to be so, still the son would thereby become tenant by sufferance, and the twenty years under the late statute," &c., "having begun to run long before, would continue to run, unless a new tenancy at will, or for some other term, were created." And he cites *Doe dem. Bennett v. Turner*, as reported in 7 M. & W. 226, and in the Exchequer Chamber, 9 M. & W. 643, in support of this proposition.

He proceeds to say: "Now there was no evidence in this case from which the jury could draw the conclusion that a *new* tenancy between the father and son had been created at any time within twenty years before the bringing of this ejectment; and, therefore, the determination of the will of the father either in 1824 or 1829 is not, in truth, material." And they upheld the charge of the learned Judge to the jury and the finding of the jury thereon.

Now this case plainly adopts the decision in *Doe dem. Bennett v. Turner*, to the effect that the time begins to run absolutely from the expiration of one year from the commencement of the tenancy, and that it continues to run from that time, unless a *new* tenancy at will or for some other term should be created; and that the actual determination of the will at a time subsequent without the creation of such new tenancy, has no operation whatever in stopping the running of the period of twenty years.

To create such new tenancy the Court of Common Pleas held, in *Doe dem. Stanway v. Rock*, that it was necessary that something should be done by the lessor; and this case of *Doe dem. Goody v. Carter* decides that the giving of a mortgage by the lessor while the tenant is in occupation is not such an act as will create the new tenancy.

And in this same case Patteson, J., says, at p. 865:

"Suppose a mortgagor pays off the mortgage and takes a reconveyance: I do not see that a tenancy at will under him is affected by that." To which counsel *arguendo* answer, "It is a different estate in each case." And to this Lord Denman replies: "There is no change, except as between the parties to the conveyance."

In *Doe dem. Bennett v. Turner*, 7 M. & W. 226, 9 M. & W. 643, it was expressly left to the jury to say whether or not the entry of the lessor, which was relied upon by the plaintiff as the act of determination of the tenancy at will, from which time it was contended the statute should be deemed to have begun to run, was with or without the consent of the tenant. The jury found it was without his consent. This finding was relied upon as establishing that the entry was a determination of the estate at will.

With reference to this part of the case, the Court of Exchequer Chamber in giving judgment say, at p. 646: "The intent of an entry is undoubtedly in many cases important, but in the case of a tenancy at will, whatever be the intent of the landlord, if *he do any act* upon the land, for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will."

From hence it appears that even an entry upon the land may be so done, if with the consent of the tenant at will, as not to constitute an act of trespass, or therefore a determination of the will.

The Court of Queen's Bench in *Doe dem. Goody v. Carter*, does not decide that the giving of the mortgage by the owner while the premises were in the possession of a tenant at will constituted a determination of the tenancy. Assuming it to be so, they were of opinion that no new tenancy had been created; but I gather from the report that, in the opinion of Lords Denman, C. J., and of Patteson, J., the giving of the mortgage there, which was executed without the consent of the tenant, had no direct operation upon the tenant, and only operated between the parties to the conveyance and therefore did not operate as a determination of the tenancy at will.

In *Doe dem. Perry v. Henderson*, 3 U. C. R. 486, in our own Court of Queen's Bench, in a most exhaustive judgment delivered by the late Sir John Robinson, C.J., it was expressly held under our statute 4 Wm. IV. ch. 1, which in this respect is identical in its provisions with the Imperial Statute 3 & 4 Wm. IV. ch. 27, that in the case of a tenancy at will the true owner is regarded as being dispossessed at the expiration of the first year's tenancy. 2. That the tenant at will, who there, as here, was a son of the owner, taking a conveyance of one half of the lot from his father, did not interrupt the running of the statute as to the other half. 3. That the acknowledgment verbally within the twenty years that the land was his father's had no such effect. 4. That the son paying the taxes by the father's direction, had no such effect.

As to this point the Chief Justice said, at p. 500: "It is clear, however, that he," the son, "was in fact occupying for his own benefit, not as the servant or agent of his father; and his paying the taxes under such circumstances is no more than what he ought to have done without any such direction. \* \* If his father had made him a deed in 1818," the time of his entry, "he must have paid the taxes; and the insisting upon it that he should do so is a confirmation, so far as it goes, that his father threw upon him the liabilities of owner of the property."

In this case, the son having entered in 1818 and obtained from his father a deed of half the lot in 1830, executed a mortgage upon the whole lot in 1840. The learned Chief Justice seems to have been of opinion, though the opinion was unnecessary to the decision of the case, that if the mortgage had been executed at any time within the twenty years from the expiration of one year from the commencement of the tenancy, and before the passing of the statute 4 Wm. IV., that would have operated as a determination of the tenancy, and would, upon the authority of *Doe dem. Bennett v. Turner*, have given occasion for leaving it to the jury whether a new tenancy had been created.

He says at p. 501: "This might have been the case, I

mean, if the mortgage had been given before the statute 4 Wm. IV. came into force. Since that statute any tenancy at will would be regarded as having ended at the expiration of the first year; and then any act, such as that of giving the mortgage, or an entry upon the premises by the right owner, as in *Doe dem. Bennett v. Turner*, would have no effect upon the relative position of the parties."

There is no doubt that in *Doe dem. Bennett v. Turner*, the entry there was before the passing of the statute; but there is no doubt, also, that subsequent cases shew that an entry since the statute, by the true owner, *animo possidendi*, will determine a tenancy at will. This, however, seems to me to depend upon a reason and a principle which does not at all apply to the execution of a mortgage, either by the true owner or by the tenant at will.

In *Doe dem. Groves v. Groves*, 10 Q. B. 486, it appeared that a widow and her only son, John Hart, an infant, resided together on property upon which the widow's husband had died seized in fee, and in possession, in January, 1798, and which thereupon descended to the infant. In December, 1798, the widow married again. She, her infant son, and her second husband, resided together on the property until 1805, when the son, being about twenty-one years of age, left the premises, his mother and her second husband, the defendant, continuing to reside upon the premises. Between 1805 and 1841, the son, the true owner of the property, occasionally resided two or three weeks at a time in the dwelling house inhabited by the defendant and his wife, being part of the premises in the declaration mentioned, as part of the family of the defendant and his said wife, and the said John Hart, the son, so resided with the defendant and his wife at the time of her death in 1841, and remained at the said dwelling house a short time, not exceeding three weeks, after the death of his mother. In September, 1842, the defendant being desirous to effect a loan upon the security of a mortgage upon the premises, was unable to do so, unless the said John Hart, upon whom the property had descended upon the death of his father, should execute

the mortgage. Accordingly, the defendant procured him to execute a mortgage to the lessor of the plaintiff, reciting that he, John Hart, was seized in fee of the premises, and the defendant received the money loaned upon such security. In an action by the mortgagee against the defendant, he claimed the benefit of the Statute of Limitations; and upon his part it was contended that upon the above facts, John Hart's right of entry was barred, and that therefore the plaintiff, his mortgagee, could not recover.

For the plaintiff it was contended that John Hart, having been an infant of fourteen years of age when his father died, it should be inferred that his mother entered, not as his guardian in socage, but in her own right, and that John Hart was entitled as her heir-at-law, or that the widow held in right of her dower until it should be assigned; and farther, that the defendant, having procured John Hart, the heir-at-law, to execute the mortgage, which recited the seizin in fee of John Hart, and shewed himself to the mortgagee in the light of a mere tenant to John Hart, he was estopped from denying at the suit of the mortgagee that he was not then tenant at will of John Hart.

Lord Denman, C. J., says, at p. 491, giving judgment: "I think that the Court, exercising," as it did in that case, "the functions of a jury, ought to presume that the defendant was tenant at will to his son-in-law. This is incorrectly likened to a case of estoppel. It is merely a question, which of two suppositions is the most consistent with the facts in evidence."

Patteson, J., says, "Here the defendant's title rests merely on the Statute of Limitations; and his acts may well amount to an admission that, *during the period in question*, he was in fact tenant to another."

And Erle, J., more clearly expresses the *ratio decidendi* thus: "The question is, whether the estate of the heir-at-law is defeated by certain acts in pais, relied on by the defendant. The lessor of the plaintiff was clearly entitled, and his title recognised in the plainest way by the defendant. But the defendant's answer is, that he occupied as

apparent owner for twenty years. To this the reply is, that the real owner came now and then and lived with him. If I had been in the place of the jury I should have held that this shewed that the defendant was in reality tenant at will."

Not one of the learned Judges rests his decision upon the mere fact of the execution of the mortgage, which, if it had stood alone, having been executed long after the title of John Hart had been extinguished, if extinguished, and had passed to the defendant, could not have divested the defendant of an estate already vested in him by the statute.

If the estate of John Hart had indeed been extinguished prior to the execution of the mortgage in 1842, or if there had not been a doubt of its having been extinguished by reason of the acts of entry upon the premises between 1805 and 1841, and being upon the premises at the time of the death of his mother, and for some weeks after in that year, he would not probably have been required to execute the mortgage. The action was brought by the mortgagee, who was lessor of the plaintiff. The judgment of the Court, as explained by Erle, J., no doubt treats the execution of the mortgage by John Hart, at the request of the defendant, and the receipt by the defendant of the money raised upon the security of it, from the mortgagee, as a plain recognition of the title of the mortgagee. To this the answer of defendant's counsel, was, that will not do under the statute, for, notwithstanding such recognition, the defendant has occupied as apparent owner for twenty years, and so has acquired a title under the statute. To which the reply was, that the real owner entered from time to time, and lived on the premises, which shewed in the judgment of the Court that the proper inference to draw was, that in reality the defendant was tenant at will throughout; so that the case is rested, not upon the fact of the execution of the mortgage, but the title under the mortgage is sustained upon matters which, independently of the execution of the mortgage, namely, the entries made by the real owner from time to time, shew that the defendant was in reality tenant at will of the true owner who executed the mortgage.

Lord St. Leonards, in his work upon the Real Property Statutes, paragraph 22, page 26, of the second edition, says: "We may observe, that the circumstance that the son-in-law acted as owner in raising money on the property at the request and for the benefit of the stepfather *long after the period* when time *per se* would have been a bar, was *also* entitled to great weight."

Now this, as it appears to me, is not language appropriate to the expression of an opinion, nor such as I think would have been used by the learned commentator to express the opinion that the execution of the mortgage *alone*, without more, was sufficient to determine the point, or if he had been of opinion that the judgment had proceeded upon that point.

Indeed, in paragraph 80, page 58 of the same work, he shews that he considered the case as having been decided upon the entries of John Hart and the creation of new tenancies at will upon each of such occasions; for there he refers to the case thus: "Where a stepfather occupied for twenty years as apparent owner, but the stepson, the real owner, went now and then and lived with him, it was ruled that *this* submission shewed that he held as tenant at will during the whole of the period."

Treating this as a just exposition of the decision, Lord St. Leonards' language in paragraph 22, p. 26 of this work, appears to me to be fairly susceptible of the following construction: The fact of the stepfather, when trying to raise money by mortgage of the property, not having set up his own already acquired absolute title under the statute, which in the action he was insisting upon, but having on the contrary procured the true owner, whose title was already extinguished unless the defendant was his tenant at will of the premises within twenty years previously, to execute the mortgage, was undoubtedly evidence entitled to great weight, upon the enquiry whether or not the defendant upon the occasion of each of the entries of the stepson upon the premises between 1805 and 1841, and particularly upon the occasion of remaining on the premises

for three weeks after his mother's death in 1841, entered into fresh arrangements with the true owner for the creation of new tenancies at will; for, if he had, his consenting to apply to the stepson to execute the mortgage was perfectly natural and consistent, whereas otherwise it was conduct quite inconsistent, inasmuch as the estate had truly, as he was contending, become absolutely vested in himself.

The case, however, as reported, is no authority for the proposition that the fact of a tenant at will, either before or after the expiration of twenty-one years' continuous possession without interruption, in which latter case he ceases to be tenant at will and becomes seised in fee, procuring the former owner in fee to execute a mortgage upon the property, standing alone without more, is sufficient to break the running of the statute in the one case, or to shew that it never had run in the other.

In *Randall v. Stevens*, 2 E. & B. 641, A. D. 1853, it was held that where the true owner, within the twenty years after the commencement of a tenancy at will, enters upon the land *animo possidendi*, and evicts the tenant from his possession, and the person so evicted enters again the same day, the statute acquires a new starting point, whether the subsequent entry be by act of trespass, or by tenancy at will, or otherwise.

*Worssam v. Vandenbrande*, 17 W. R. 53, A. D. 1868, and *Clements v. Martin*, in our own Court, 21 C. P. 512, are to the same effect; but these cases proceed upon a principle wholly unconnected with that in *Doe dem. Bennett v. Turner*, or in any of the other cases. Where a party by entry and eviction of his tenant obtains complete repossession of his own estate, he can have no occasion to bring an action of ejectment for any previous possession held by the occupant. When that same person enters thereafter it must be as a trespasser or as tenant at will. If the former, the right of entry accrued to the true owner upon the commission of the act of trespass; if the entry was as tenant at will, the right of the true owner to enter would be by the statute upon the determination of the

will, or at the expiration of one year from the commencement of the tenancy.

To hold, in a subsequent ejectment by the true owner, that the occupant should be able to set up the possession he had before he was evicted, to defeat the title of the person who, in the exercise of his undoubted right, had removed him from that possession as effectually as if he had done so by action of ejectment and a writ of *habere facias possessionem*, would be contrary to the plainest principles of common sense.

It is true that although the point was not before him for judgment, Lord Campbell, in *Randall v. Stevens*, seems to express his preference for the construction of the statute which as counsel for the plaintiff he had contended for in *Doe dem. Bennett v. Turner*; but recognising the force of subsequent decisions, he acknowledges it to be too late to consider, except in a Court of Error, whether, where the tenant has remained in possession continuously for twenty-one years, the tenancy at will being during that time determined by an act of the landlord, without his actually having been in possession, there be ground for the distinction as to the operation of the statute between a subsequent tenancy at sufferance and a new tenancy at will, which is allowed to create no bar.

In *Doe dem. Shepherd v. Bayley*, 10 U.C.R. 310, A.D. 1853, where the true owner entered upon the tenant at will some years after the commencement of the tenancy, with the intention, declared in the defendant's presence, of asserting his right and taking possession, an offer to purchase the land from the person so entering subsequently made by the defendant was held to be evidence of a new tenancy at will having been created, following *Doe dem. Bennett v. Turner*.

In *Foster v. Emerson*, 5 Grant 135, our Court of Chancery, in 1853, notwithstanding the above decisions, by an unanimous judgment of the three learned judges of that Court held that the true construction of the statute was, that a tenancy at will is not determined by the statute at the expiration of a year from its commencement, when the parties continue to deal with it as a subsisting tenancy.

What appears most singular in this decision is, that *Doe dem. Groves v. Groves* is assumed to be an express authority upon the point, and to be directly at variance with *Doe dem. Perry v. Henderson*; and many of the above cases which I have collected are not referred to by the Court.

This ruling of the Court of Chancery is the only one which I have been able to discover wherein a like ruling has been held from *Doe dem. Bennett v. Turner* to the present time. Except for that judgment, there exists nothing to rest the proposition upon, but the argument of counsel and the suggestion of Lord Campbell thrown out in *Randall v. Stevens*, that to establish it would require the intervention of a Court of Error.

There is no feature in the case before us similar to that presented by the letter which in *Ley v. Peter*, 3 H. & N. 101, occasioned so much difference of opinion among the learned Judges of the Court of Exchequer, so that that case cannot be relied upon as authority in this.

Neither has the case of *Hodgson v. Hooper*, 3 E. & E. 149, A.D. 1860, any bearing upon the case, further than in so far as it approves of the decision in *Doe dem. Bennett v. Turner*.

Cockburn, C. J., delivering the judgment of the Court upon the point, says, at p. 171: "If *before* the right of entry upon a tenant at will is gone, the tenancy is put an end to, and a new tenancy at will created by fresh agreement express or implied between the parties, then, according to the decision in *Doe dem. Bennett v. Turner*, with which we concur, a fresh right of entry accrues, and an additional period of twenty years must run before that entry would be barred. Whether such a fresh tenancy was created or not is a question of fact."

In *Locke v. Matthews*, 13 C. B. N. S. 753, A.D. 1863, it was held that under the circumstances there appearing the original tenancy at will was determined within the statutory period, and that a new tenancy was created by agreement between the parties.

Erle, C. J., says at p. 761: "In ordinary cases, an estate at

will is effectually put an end to by a clear expression of the determination of the will; but this statute requires some more decided act on the part of the owner of the land, to prevent the acquisition of a title by one who remains in possession. It appears to me, however, that a great deal more was done here than a mere expression of an intention to determine the will. The tenant is told that he must go out; and the owner of the fee simple enters by his agent, and serves the tenant with a declaration in ejectment, indicating in clear and unmistakable terms that he must give up the land, and doing that which would amount to a trespass, if there were any existing legal estate in the tenant. The original tenancy at will having been thus put an end to, the agent of the owner of the fee, on the party pressing him with the hardship of being turned out after having so long enjoyed the occupation," and upon the solicitation and intercession of a friend of the tenant, "kindly consents to his remaining in possession of the cottage and two acres of the land for the life of himself and his wife."

It was held that this clearly constituted a *new* tenancy at will.

Erle, C. J., after reciting the sections of the statute, further says, at p. 762: "Therefore, after twenty-one years from the commencement of the tenancy at will, the title of the real owner is absolutely barred or extinguished, unless such title is preserved to him by some of the other provisions of the statute."

Again he says, at p. 763: "The original tenancy did not continue: and it is clear, that, to satisfy the words of the section I have referred to, it must be the *same* tenancy for the whole twenty-one years."

Willes, J., says, at p. 767: "The owner of the fee entered upon the land for the purpose of taking possession of it, and turning out the tenant at will. At the intercession of the tenant, he was allowed to retain a part of the land, and as to that part, with his consent, a new tenancy at will was created." And he adds his concurrence in the Chief Justice's opinion that the seventh section means that the twenty

years is to begin to run from the end of the first year after the commencement of the tenancy at will which existed next previously to the question being raised whether a title has been acquired under the statute.

In *McLaren v. Morphy*, 19 U. C. R. 609, it was held that a house remaining vacant for a period of two years did not interrupt the running of the statute as to a small piece of land which the occupant of the house had attached to his house by enclosing it with other land held with the house under a title from the owner of the land upon which the house stood, and that therefore the possession of the small piece of land so attached was continuously held by the defendant and those under whom he claimed for twenty-one years, and that the true owner of the little piece so attached was barred.

In *Day v. Day*, L. R. 3 P. C. 751, which came before the Privy Council on Appeal from the Supreme Court of New South Wales, an exposition of the law, conclusive in so far as our Courts are concerned, is given by the Court of Ultimate Appellate Jurisdiction to which the decisions of our Courts may be brought for revision.

The appeal was brought against an order of the Supreme Court of New South Wales, by which it was ordered that the verdict found for the plaintiff should be set aside and a new trial had between the parties.

The action was one of ejectment, in which the plaintiff sought to recover a piece of ground in the city of Sydney, which had formerly belonged to Thomas Day, the elder. His residence and the premises on which he carried on his business as a boat-builder were situate on this property. In May, 1842, he gave over the business and the property, but not by any deed of conveyance, to his eldest son, then of age, and went to reside upon another place of his own. Thomas Day, the younger, so put in possession, continued in the occupation from May, 1842, down to the time of his death in 1864. He made his will, and devised the property in dispute to his wife for life. She was the plaintiff in the ejectment. The defendants claimed under the will of

Thomas Day, the father, who, in 1867, after his son's death, procured attornments from the tenants on the property to whom Thomas, the son, had let portions.

At the trial, it was submitted, on the part of the defendants, that as it appeared in evidence that at various dates, commencing in or about 1852, Thomas Day, the son, let portions of the property in dispute on yearly and weekly terms, and received rent for the same, and transferred or purported to transfer part of the land to his brother William, who let and received rent for the same, of which lettings and transfers Thomas Day, the father, had notice at the times at which they took place respectively, and that as the portion of the land sought to be recovered continued to be to the knowledge and with the sanction of Thomas Day, the elder, in occupation of Thomas Day, the younger, or of tenants paying rent to him, until his death in 1864, these facts amounted to a determination of the original tenancy at will created in May, 1842, and to the creation of a new tenancy, so that the Statute of Limitations began to run in favour of Thomas Day only from such determination.

A nonsuit was called for, but the learned Chief Justice refused to nonsuit, and submitted certain questions to the jury, in answer to which the jury found that the letting of portions of the premises, and transferring a portion of them, was not in violation of Thomas Day's, the father's, authority to him, and that there was not at any time after such letting or transfer a fresh tenancy at will created by the father: that he did not thereafter, with knowledge of the act or acts done by Thomas Day, jr., give a new authority to occupy; and that Thomas Day, sr., knew of the acts of letting or transfer, and so knowing assented thereto; and the jury thereupon, under the direction of the learned Chief Justice, rendered a verdict for the plaintiff.

The majority of the Court, against the opinion of the Chief Justice, granted an order for setting aside this verdict and for a new trial, being of opinion that the acts of letting, with notice to Thomas Day, senior, amounted to a determination of the tenancy at will, and that the statu-

tory period began to run afresh from such determination.

One of the learned Judges constituting the majority of the Court, was of opinion that the Chief Justice's charge as to the manner in which a new tenancy at will might be created was erroneous, and that the jury ought to have been told that they might infer the creation of such a tenancy from the conduct of the parties.

The other learned Judge, the Court consisting of the Chief Justice and two puisne Judges, was also of opinion that the verdict was against evidence.

The plaintiff appealed to the Privy Council against the order granting the new trial.

Sir Joseph Napier, Bart., delivering the judgment of the Court, which consisted of himself, Sir Jas. Wm. Colville, Sir Robert Phillimore, the Lord Justice James, and Lord Justice Mellish, says, at p. 760, after quoting the sections 2 and 7 of the Imperial statute, corresponding with our statute: "The reasonable construction of this provision is (according to Lord St. Leonards), that the right shall accrue *ultimately* at the end of a year from the commencement of the tenancy at will, though it may accrue *sooner* by the actual determination of the tenancy. In the present case the right under the statute must be deemed to have first accrued to Thomas Day, the father, in May, 1843, at which time the tenancy at will, under which the occupation began, must for the purposes of the bar of the statute be deemed to have determined. The condition of Thomas Day, the son, was, for these purposes, but that of tenant at sufferance, from and after May, 1843, unless and until a subsequent tenancy at will was created by a fresh agreement of the parties. The defendants submitted that there was a determination of the original tenancy within twenty years before the end of the period of limitation. The acts on which they relied, in order to shew that the original tenancy was so determined, were consistent with the character of the occupation confided to Thomas the son, and were beneficial to the property. It seems difficult to conclude that acts, which were conformable (not contrary) to

his father's will, which had his *sanction*, and so far were authorized, not wrongful, should have determined the tenancy at will. It might be more reasonable to regard them as acts of a like character done by a mortgagor or *cestui que trust* in possession are regarded—that is to say, as impliedly authorized by the character in which, and the circumstances under which, he occupies at will. It seems to their lordships that as in this case the statute began to run from May, 1843, the question of a subsequent determination of the original tenancy is only relevant so far as it may have been preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation. In any other view, such a determination of the original tenancy after the end of the first year is *per se* irrelevant. When there is an alternative given by the statute sufficient to set it running, it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which, if time had not been running, would itself have set it running. The actual subsequent determination of the tenancy could only have the effect of making the tenant, for *all* purposes, when he was already, from the end of the first year, for the purposes of the bar of the statute, a tenant at sufferance. Their lordships are therefore of opinion that the defence made at the trial cannot be maintained. \* \* Their lordships are clearly of opinion that the statute began to run in favour of Thomas Day, the son, in May, 1843, at the end of the first year of his tenancy, and that a subsequent determination of that tenancy could not of itself be sufficient to stop the running of the statutory bar. When the statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will."

And again he says, at p. 762: "Assuming that there was a determination of the tenancy, and that the occupation of Thomas Day the son continued without interruption, to the knowledge and with the sanction of Thomas Day the father, this would constitute an occupation at sufferance to *all* intents, and, so far as related to the purposes of the statutory bar, no alteration would be made in the status of Thomas the son. The right of entry created by the seventh section of the statute was not thereby waived, suspended, or extinguished; there was no reversion of possession; the running of the statute was in nowise impeded. Doubtless an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved, as ought to satisfy a jury that the parties actually made such an agreement; and in that event it is proper to be found by a jury as a material fact in issue. No such evidence has been given in this case."

And again, he says, at p. 763: "The language and policy of the statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will."

To apply then this judgment, which is conclusive as affects our Courts, and is, it seems to me, in strict conformity with all the previous decisions both in England and in this Province, save only the case of *Foster v. Emerson*, which alone is in antagonism with it, and as we have, in compliance with the Law Reform Act, to discharge in this case the functions of jurors as well as of judges, I have no difficulty in arriving at the conclusion that the original entry of George Keffer the son in 1859 was with the intention entertained by the father, and the expectation entertained by the son, that the son should regard the property as his own, and that he should eventually be the owner by a deed or will executed by the father. As however this, the father's acknowledged intention, was not effectually expressed, the son became, upon entry, in law, tenant at will of his father.

As a point of law I have no difficulty in deciding that the statute of limitations began to run against the father at the expiration of one year from that entry, namely, in or about March, 1860.

I find also, as a matter of fact, that at the time the mortgage was executed by the father, neither the father nor son entertained any intention that the condition or status of the son should be in any way affected by the mortgage to any other extent or in any other manner than that the rights which the father then had should be transferred to the mortgagee. There was no intention that the son's continuing to hold should be in any respect different from what it had theretofore been. There was no intention upon the part of the father to resume possession, or upon the part of the son to give up possession, or to enter into any fresh terms as to possession under a new tenancy. The act of creating the mortgage was conformable with the son's continuing in occupation under the identical terms upon which he had first entered.

There is no suggestion in the evidence that any thing took place directly between the son and the mortgagee. Had there been such evidence it might have given rise to a question whether or not what had taken place should not be regarded as evidence of the tenant having attorned to the mortgagee; but attornment by a tenant at will to a stranger, although it would no doubt constitute an actual determination of the tenancy at will, which, until such attornment, had existed; still it would be no evidence of—on the contrary, it would be evidence in contradiction of—any new tenancy at will under the former landlord, the true owner, having been created, and time would continue to run against such true owner, notwithstanding the attornment. I do not see why there might not be an attornment by a tenant at will to a mortgagee, which should have no greater force than an attornment to a stranger.

But in the case before us I see no occasion, in the interest of the mortgagee, to necessitate any change in the condition or status of the son as tenant at will; no necessity for the creation of a new tenancy, as between father and son.

In every case, in estimating the proper inference to be drawn from the acts of parties, we must look at their position, the object they had in view, and their intention; and I can see no reason why the present plaintiff should be heard to set up the supposed interest of the mortgagee in order to infer the creation of a *new* tenancy at will between the plaintiff and his son contrary to their actual intention at the time. At the time the mortgage was executed, the tenant at will had been only ten years in possession. The mortgage was made payable in five years, namely, February, 1870, and the interest annually. If the tenant at will had not paid the interest as it fell due, and the principal as it fell due, as he undertook to do, the mortgagee's security was unprejudiced. He had a perfect right to enforce his title, and sufficient power to protect himself, without any change whatever in the nature of the tenancy under which the defendant held the premises under his father at the time of the execution of the mortgage.

As matter of fact, I find then that neither father or son had any intention to change the tenancy or to create a new one,—there was no necessity for any such change.

I am therefore of opinion, as a point of law, that the execution of the mortgage did not operate as an actual determination of the original tenancy at will. That tenancy still continued precisely in *statu quo*, except in so far as for the purposes of the statutory bar was concerned.

Assuming, however, the execution of the mortgage to operate as an actual determination of the original tenancy, the statute having already begun to run, its running was not stopped thereby, unless a new tenancy was created by a fresh agreement between the parties; and as a matter of fact I come to the conclusion that there is no evidence, as I have already said, from which the creation of such a new tenancy between the father and son, express or implied, should be inferred. The evidence of the father himself is, to my mind, conclusive that he did not intend creating any such new tenancy, and the evidence of the son, that no such a thing was intended or contemplated by him; and

there is no act of interference by the father with the son's possession, nor a subsequent agreement of any kind, which would make it proper to infer by implication the creation of a new tenancy between them.

The cases above cited shew that neither the payment of the mortgage by the son, nor the execution of the discharge of the mortgage, operating as a re-conveyance, nor the execution of the leases by the son with the knowledge, and it may be consent of the father, can be treated as a determination of the original tenancy at will. All these acts are quite conformable with the character in which the son contends he occupied from the beginning, namely, by the gift of the father, and as true owner, in the expectation of his title being made perfect in law at some time. The father himself, indeed, admits that the son always occupied as if he was owner; was assessed as such; paid taxes as such; and that the father never demanded either from him or his tenants, possession of the premises, nor any rent until the last week of June, 1876, when the son peremptorily refused to pay, claiming the property as his own.

In short, I see nothing in the evidence from which, under the circumstances, we could properly conclude that the father or the son did any act indicating an actual determination by them of the original tenancy at will unless it be this demand and refusal to pay rent; but this in itself would be irrelevant, unless a new tenancy at will or for some other term were subsequently created. Indeed, if the mortgage was evidence from which the creation of a new tenancy at will should be inferred, that would not aid the plaintiff, for, it being dated the 21st day of February, 1865, the statute begun to run, as to the right of entry thereby acquired, in February, 1866, and no new tenancy at will upon any subsequent agreement between the parties has been shewn at all.

In my opinion the proper conclusion to draw from the evidence is, that as between the parties the identical same tenancy at will which commenced by the defendant's first entry continued throughout, except for the purposes of

the statutory bar, for which purpose it is to be deemed to have terminated at the expiration of the year from the first entry; and that no new tenancy at will by any fresh agreement, express or implied, has ever since been created.

However it is clear there was no new tenancy created between father and son since February, 1866.

The result then is, that by force of the Ontario Statute, 38 Vic. ch. 16, passed in December 1874, the plaintiff's title must be held to be barred.

It is not disputed that the plaintiff is a person in the condition of one as to whom that statute came in force on the 1st July, 1876, up to which time from the passing of the Act he had not availed himself of his right of action; and the peculiar wording of the statute seems to have this effect, that upon any action being brought after the Act should commence, the term of limitation of twenty years mentioned in the 88th chapter of the Consol. Stat. of U. C. shall be ten years, and that such 88th chapter shall be read as if ten years and not twenty was the period inserted therein. The plaintiff did not commence this action until the 28th of September, 1876. He can only claim the benefit of ch. 88, Consol. Stat., as if ten years was the term within which from the accruing of his right of entry the action should have been brought. Had this action been commenced before the 1st July, 1876, the plaintiff would not have been barred; as it is I think he is.

The rule will be absolute to enter a verdict for the defendant.

HAGARTY, C. J.—The very full and lucid analysis of the authorities made by my brother Gwynne, renders it unnecessary for me to go over the same ground.

A perusal of the cases does not leave a very satisfactory impression on my mind, and it is not easy to say that they are uniformly consistent.

In the particular case before us, there may be no real injustice in holding the defendant entitled to retain the land against his father, but the rigid application of the

existing law of limitations may work great hardship in other cases equally coming within its application.

I have felt, and still feel, very great difficulty in holding that a son holding for seven or eight years as tenant at will under his father, can procure the latter to borrow money on mortgage of the land for the use of the son, who receives the money and spends it, and yet is not to be held as bound by such an act to the admission that at that time the land was his father's, and so prevent the Statute of Limitations from continuing to run from an earlier period.

But the authorities shew that the statute in the present case certainly began to run at the end of a year from the defendant's entry, and the bar under our late Act must prevail, unless there have been not merely a determination of the original will, and a mere continuance in possession on sufferance, but some evidence from which it can fairly be held that a new tenancy at will was created between them.

The case of *Day v. Day*, in the Privy Council, L.R. 3 P. C., 75, lays down some clear propositions.

"Their lordships are clearly of opinion that the statute began to run in favour of Thomas Day, the son, \* \* at the end of the first year of his tenancy, and that a subsequent determination of that tenancy could not of itself be sufficient to stop the running of the statutory bar."

They then discuss the evidence on which it was sought to presume a fresh tenancy.

"The language and policy of the statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will."

This is the latest exposition of the law, and must be accepted by us, if applicable to the facts of this case.

These facts go somewhat beyond any former case that I have seen. *Doe dem. Groves v. Groves*, 10 Q. B. 486, is the nearest, but there was this difference: the person setting up the statute had some years over the twenty in his

favour when he procured the heir at law to execute the mortgage for his benefit; and, as against his alleged right to the premises, twenty years' possession, was set up the occasional residence of the heir at law upon the premises, down to a very late period.

The judgments are very meagre. Sir William Erle says, at p. 492, after noticing that the real owner came now and then and lived with the defendant: "If I had been in the place of the jury I should have held that this shewed that the defendant was in reality tenant at will."

Then in *Doe dem. Goody v. Carter*, the father, who put the son in as his tenant at will, took a conveyance of the land some years thereafter, then for the first time gaining a legal title. Again, some years later, the father gave a mortgage on the land to the person claiming to recover. The son, however, seems to have had no concern with this mortgage.

The Court held, that the conveyance to the father had no effect on the tenancy at will between him and the son; and that, even if the father's mortgage determined the will, the son would thereby become tenant at sufferance: that the statute had begun to run, and would continue, unless a new tenancy at will or for some other term were created; and that there was no evidence that a new tenancy had been created at any time within twenty years before bringing the ejectment.

This case then seems reduced to this, whether the action of the son in procuring the father to make the mortgage for his benefit, receiving the money, and afterwards procuring a re-conveyance to be made to his father, distinguishes it from all others.

My brother Gwynne has pointed out that the evidence shews there was not only no declared intention to alter the position of the father and son towards each other, but an apparent intention that things should remain between them as before, and therefore it is impossible to hold that any fresh tenancy was created.

It may seem hard that such acts would not amount to a

binding admission or acknowledgment of the then right of the true owner, so as to put an end to any previous running of the statute.

*Doe dem. Perry v. Henderson*, is a very clear and full exposition of the insufficiency of all verbal admissions of title and of many acts however inconsistent with the idea of an assertion of ownership in the actor.

I have, therefore, come to the opinion that a fair application of the principles laid down in the decided cases, compels us to hold that the plaintiff's right here is barred.

GALT, J., concurred.

*Rule absolute.*

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## PALMER V. THORNBECK ET AL.

*Township of Scarborough—24 Vic. ch. 64, 25 Vic. ch. 38—Effect of survey under—Proof of original monuments—Statute of Limitations.*

In ejectment to try a question of boundary, the plaintiff claimed the north half of lot 31. Defendants limited their defence to a piece described by metes and bounds, giving notice that they claimed it as part of lot 32. *Held*, that the plaintiff was not entitled to succeed on proving his title to lot 31; but that it was for him, seeking to change the possession, to shew that the piece in dispute was part of that lot.

In this case it appeared that over twenty years ago a fence was mutually erected by plaintiff and defendants' father, who then occupied lot 32, as a line fence along the course of an old blazed line, though for what purpose such line had been run did not appear. The fence continued to be used as a line fence until 1862-3, when, in consequence of the survey made under the 24 Vic. ch. 64, and 25 Vic. ch. 38, the plaintiff claimed that the line was incorrect, and he procured the surveyor, who had made the survey, to run the line. The surveyor divided equally the space in the block containing these two lots between the road monuments planted several years previously by himself at the front angles of the side road allowances; but there was no evidence to shew how he ascertained the position of such side roads in making that survey, or of any search for the original monument. In 1865-6, after this new line had been run, the plaintiff pulled down a piece of the old fence and removed it to the new line, where it remained for two or three days, until put back by the defendants to the original line, where it has so remained ever since.

*Held*, that these statutes did not interfere with any original posts, if existing: that the evidence was insufficient to shew plaintiff's right to claim according to the statutable survey, and a new trial was granted.

Per Gwynne, J.—That the onus was on the plaintiff of proving the original monument marking the front angle of the lot, or its loss, and that there was no satisfactory evidence of its position, before the mode adopted of dividing the space between the road monuments could be adopted.

Per Hagarty, C. J.—That on proof, which was wanting here, of the statutable directions having been obeyed in laying out such side lines and planting the monuments, then that plaintiff would be entitled to the statutory division, and the onus of proving an original monument, marking the front angle of the lot, was on the defendants.

Per Galt, J.—That under those statutes, the onus of proving the existence of original monuments was cast upon the person asserting it.

*Seemle*, that the plaintiff's entry in 1865-6 was sufficient to stop the running of the Statute of Limitations.

THIS was an action of ejectment brought to recover a piece of land described in the plaintiff's writ, as the north half of lot 31 in concession B., in the township of Scarborough.

The defendants limited their defence to a piece which they described by metes and bounds, commencing on the

south side of the allowance for road between concession B. and concession C. of the said township, where the line fence, which at present and has heretofore formed the boundary line between the north half of lot No. 31, and the north half of lot No. 32, meets such limit of said concession road allowance; thence westerly along the south limit of the said road allowance, eighteen feet, to a line run by provincial land surveyor, Passmore, for the plaintiff in the month of May, 1865; thence southerly along such surveyed line, 50 chains 50 links, more or less, to the centre line of the block dividing the north half from the south half; thence easterly along such centre line 33 feet to the fence before mentioned, which has heretofore existed and at present forms the division line between the property of the plaintiff and the property of the defendant; thence northerly along the centre line of the said fence, 50 chains 50 links, more or less, to the place of beginning, containing two acres.

The defendants, with the notice limiting their defence to the piece of land above described, served a notice under the statute, that they claimed that the portion of land to which they had so limited their defence was not a part of lot No. 31 as claimed by the plaintiff, but that it was part of lot No. 32 in concession B. of the township of Scarborough, of which they claimed to be seised; and besides denying the plaintiff's title thereto, they claimed also title by twenty years' possession in themselves, and those under whom they claimed.

The cause was tried before Morrison, J., without a jury, at Toronto, at the Fall Assizes of 1876, when a verdict was entered for defendant.

The facts, so far as material, are set out in the judgment.

In Michaelmas term, November 22nd, 1876, *J. K. Kerr*, Q. C., obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict entered for the defendants, and to enter a verdict for the plaintiff.

In the same term, December 4th, 1876, *McMichael*, Q. C., shewed cause. There was no necessity for the defen-

dant to have gone into his defence, as the onus was on the plaintiff to prove that the piece in question formed part of lot 31. However, the line drawn by the surveyor was not drawn in accordance with the statute. Sec. 6 of 25 Vic. ch. 38, must be read in connection with sec. 3 of 24 Vic. ch. 64, and the mode pointed out in the first named Act is only to be adopted when the original monuments cannot be found, or their position ascertained; and there is no evidence here of any such search. The plaintiff is bound by the Statute of Limitations. The entry in 1865 or 1866, does not constitute such an entry as would cause the statute, which had already begun to run, to cease running.

*J. K. Kerr*, Q. C., contra. The plaintiff on the mere production of title to lot 31 was entitled to recover, and it rested upon defendant to shew that the land in question formed part of lot 32. The line run by Passmore is the true line, and the plaintiff is entitled to all the land up to that line. The old line was never looked upon by the parties as the division line, but was only to exist until the true line was run. The Statute 25 Vic. ch. 38 sec. 6, even though it be read with the previous Act 24 Vic. ch. 64 sec. 3, in the absence of proof of the existence of the original monuments, peremptorily requires the line to be run, as was done here, namely, by dividing equally the space in the blocks, &c., even though the plaintiff may have been in possession of the land as part of lot 32, or according to the original monuments it might have formed part of lot 32, and so granted by the letters patent. The onus of proof of the existence of the original monuments is upon the defendants. The defendants have acquired no title under the Statute of Limitations. The effect of sec. 6 25 Vic. ch. 38, is to vest the land in the plaintiff, notwithstanding previous to its passing the defendants may have been in possession for the statutory period; or at all events the statute would only commence to run from the passing of the Act. Moreover, the plaintiff's entry in 1865 or 1866 caused the statute to run only from that period: *Clements v. Martin*, 21 C. P. 512; *Williams v. McDonald*,

33 U. C. R. 423; *O'Hearn v. Donelly*, 13 C. P. 513; *Dennison v. Chew*, 5 O. S. 161; *Potter's Dwaris* on Statutes, 56, 117; *Brisbin v. Farmer*, 16 Minn. 215; *Burwell v. Tullis*, 12 Minn. 572; *Cook v. Kendall*, 13 Minn. 324; *Holcombe v. Tracy*, 2 Minn. 241; *Sedgwick* on Statutes, 2nd ed., 613; *Doe dem. Bennett v. Turner*, 7 M. & W. 226, 9 M. & W. 644; *Doe dem. Shepherd v. Bayley*, 10 U. C. R. 310.

February 5th, 1877. GWYNNE, J.—The issue joined herein, raised, firstly, the question of the situs of the boundary line between lots 31 and 32; and, secondly, if that should be decided in the plaintiff's favour, the question of twenty years' possession barring the plaintiff's title, if he had any.

The plaintiff, at the trial, produced letters patent, issued in July, 1839, granting to him in fee the north half of lot No. 31, in concession B. in the township of Scarborough, and his counsel there rested his case.

For the defendant, it was urged that the plaintiff had proved no case: that upon the issue joined, it lay upon the plaintiff to shew that the piece of land in dispute is part of plaintiff's lot, No. 31.

The learned Judge was of opinion that the plaintiff had shewn a *prima facie* case.

If the case had rested here, and no other evidence had been offered, I entertain no doubt that the plaintiff should be nonsuited, or the verdict should be rendered for the defendants.

On an issue so raised, as to the true boundary line between lots, the *onus probandi* lies upon the plaintiff who seeks to change the possession.

The language of Sir J. B. Robinson, C. J., in *Irwin v. Sager*, 21 U. C. R. 373, is precise upon the point. Changing the numbers of the lots in that case for those in this, his language, at p. 377 is: If the defendants were simply to deny that their neighbour, the plaintiff, had any title to lot 31, and go to trial upon that, he would fail at the trial, as

soon as the real state of the title to lot 31 was made to appear. But there is no difficulty in both parties putting the question between them on the proper footing for trial. The defendants have no doubt that the plaintiff means to insist that lot 31 covers land which they, the defendants, deny that it does cover, and they have only to state what land it is of which they admit they are in possession, and for which they mean to defend as being part of lot 32, and therefore theirs, and no part of lot 31, which they admit belongs to the plaintiff.

In *Doe dem. Strong v. Jones*, 7 U. C. R. 385, the same learned Judge says, at p. 388: "In all ejectments brought on account of disputed boundaries, the plaintiff has to shew beyond any reasonable doubt that he is entitled to a verdict for some land at least of which the defendant is in possession."

The production of letters patent granting lot 31 to the plaintiff, proved him to be entitled to that lot, wherever its metes and bounds might be; but it left the question at issue between the plaintiff and the defendants untouched, which question was, is the piece of land for which the defendants defend part of that lot 31, as the plaintiff has asserted it is, or not? Upon principle and upon authority, therefore, if no other evidence had been offered than the letters patent for lot 31, the plaintiff must have failed; but the defendants' counsel, yielding to the ruling of the learned Judge, called evidence for the defence.

This evidence, I think, establishes beyond all reasonable doubt that a fence was erected as a line fence between the north halves of lots 31 and 32, while the former lot was in the occupation of the present plaintiff, and the latter in that of the defendants' father: that the plaintiff and the defendants' father, as they cleared their land, mutually erected this fence: that a portion of it was erected much over twenty years; and that it was all erected over twenty years before the commencement of this suit we may fairly conclude, for the plaintiff himself, who has lived on this north half of lot 31 for fifty years, will not undertake to say that

it has not been, and that it was is sworn to by at least ten witnesses.

In erecting the fence, I think the evidence shews that the parties proceeded along the course of an old blazed line; when or for what purpose such blazed line may have been run did not at all appear, but in making the fence, that blazed line seems to have been pursued, although the plaintiff appears not to have been always satisfied that it was the true line. What caused his doubts, or when first they arose, does not clearly appear; but I think the fair conclusion from the evidence is, that they did not assume any definite shape until Mr. Passmore surveyed the township in 1862-3, under the provisions of 24 Vic. ch. 64 and 25 Vic. ch. 38, when, as the plaintiff himself says, he was able to see by the township survey that Thornbeck had land he ought not to have, and he got Mr. Passmore to run the line. Before he had said that he and Thornbeck put up the fence, and he considered it as defining the limits of their lots; but he added that they were to have the line run, and that they were finally to make up the fence according to the line when run. Thornbeck is dead, so that we cannot have his evidence upon this point; and in this action, which is against the heirs of Thornbeck deceased, much stress cannot be laid upon this portion of the plaintiff's evidence, in view of the provisions of the Ontario Act, 38 Vic. ch. 10 sec. 6.

If there had been any evidence that the line between these lots had been actually run upon the original survey, the fact that the fence had been erected along a blazed line would, I think, justify the inference that it was along the original blazed line. The old fence varies so little from the line run by Passmore, which in some places runs along the old line, and in other places crosses it, and both lines run so nearly from the same point in the front of the concession, and the deviations in the rear half do not seem to be greater than might be accounted for by the difference between a line run through the bush fifty years or more ago by compass, and one run ten years ago, instrumentally,

when the land was all cleared. But the onus to prove the true line lay not on the defendants, and their evidence seems to have been given for the purpose of establishing title by twenty years' possession, even if the piece of land in dispute should be considered part of lot 31.

In reply to this evidence of the defendants the plaintiff proved the fact of the survey of the township by P. L. S. Passmore, under the above mentioned Acts, and that afterwards the plaintiff procured Passmore to run the line between the lots 31 and 32. What Passmore did was to divide the block, consisting of these two lots, in equal parts, so running the line, without ascertaining or determining whether or not there was an original post planted on the original survey designating the front angle of the lots, or whether the line had been run through upon the original survey, or whether or not the old fence was upon the original line if run. The plaintiff's contention being that the true construction of the 6th section of 25 Vic. ch. 38, is that the blocks between side roads as determined by the survey under the Act, such blocks consisting of two lots, are imperatively to be divided into equal lots, whether the old monuments and lines between lots as run upon the original survey are in existence and plainly discernible or not.

The plaintiff also gave evidence that in 1865 or 1866, he pulled down a piece of the old fence, and removed it to the Passmore line, which, however the defendants again within two or three days put back to the old line, and have since maintained it as it was first erected. The plaintiff's contention as to this was, that for two or three days the fence remained where he had removed it to before the defendants removed it back again, and he contended that this entry broke the running of the Statute of Limitations, and that the time can only be counted from the time that the defendants moved back again the fence to the old line, which, according to the evidence, appears to have been sometime in 1865 or 1866, and this action was commenced on the 27th June, 1876, before the coming into force of the Ontario Act 38 Vic. ch. 16.

The plaintiff's contention is, that under the 3rd section of 24 Vic. ch. 64, in connection with the 6th section of 25 Vic. ch. 38, the lines between lots, whether there be or be not any original monuments existing defining the boundaries as laid down upon the original survey, are to be run and laid down upon the ground, by dividing equally the space in the blocks between the monuments planted at the side line road allowances under authority of the Acts; and that although the defendants may have been in possession, as part of lot 32, of a piece of land by such division made part of lot 31—nay, that although in truth and in fact, according to the original monuments planted upon the original survey, such piece of land was always undoubtedly part of lot 32, and so held by grant from the Crown—it shall be recovered by the plaintiff as, and shall be taken to be, part of lot 31 granted to him by the letters patent issued in 1839.

The defendants, on the contrary, contend that whenever original monuments, or their situs, can be found upon the ground defining the limit between lots as surveyed upon the original survey, they must govern as the starting points in front, and that the lines as originally run, if run and they can be found, must govern, and that in such case the direction contained in the 6th section of 25 Vic. ch. 38 does not apply.

They also contend that as the plaintiff is the person who affirms that the piece in dispute is part of lot No. 31, and he is seeking for that reason to disturb the defendants' possession, it lies upon him to prove that no trace of the monuments planted or lines run, if run upon the original survey, can be found, before he can claim a division of the block in which these two lots are, under the Acts referred to.

As to this point the plaintiff offered no evidence, relying upon the construction, which he now contends for, of the 6th section of the latter Act, as peremptory applicable in all cases.

The defendants also rely upon the Statute of Limitations as a bar to the plaintiff's recovery, even if the piece in dispute is to be taken as part of lot 31.

The plaintiff, on the contrary, contends that the effect of the latter portion of the 6th clause of 25 Vic. ch. 38, is to vest the piece in the plaintiff, notwithstanding that the defendants might have acquired title by the Statute of Limitations, or at least that the statute was to be regarded as running only from the passing.

The defendants' counsel abstained from arguing the point as to the construction of the *non obstante* part of the 6th section of the Act, not that he abandoned the title claimed to be acquired under the Statute of Limitations, but that he relied chiefly upon his construction of the 25 Vic. ch. 38 as to the running of side lines, and the absence of any evidence upon the part of the plaintiff to shew any occasion for adopting any other line than that which was determined on the original survey; and in the absence also of all evidence upon his part to shew that such original survey established the line as contended for by the plaintiff.

The first observation which seems naturally to present itself in considering the plaintiff's contention is, that there does not appear to exist any such urgent necessity as should induce the Legislature to enact such a sweeping interference with vested rights as that in a case where the limit between lots as designed and laid down upon the ground upon the original survey, (which intended to make the lots equal) and according to which the letters patent, granting the respective lots issued, can be found and traced, a division of those lots should nevertheless be made in such a manner as to transfer to one person a strip of land which had been, it may be for forty or fifty years, the undoubted property of another, granted to him by letters patent, issued in pursuance of the original survey.

The statute 24 Vic. ch. 64 fixed the side line road allowances, then already opened, as they were opened, and as they should be defined on the ground under the Act, as unalterable side line road allowances, although they should run upon courses different from those contemplated on the original survey. After the survey directed by the Act of those side line road allowances throughout the township

should be effected, then the 3rd section provided that whenever a survey should be made of any line for side-road allowance, which had not been opened previous to the passing of the Act, or any division line or limit between lots, the lines should be drawn from the post or monument planted in the original survey at the front angle of such road allowance, or lot respectively, and that if such original post or monument should be lost, and no satisfactory evidence of the position of the same should exist, then that the surveyor should proceed as in similar cases under the law in this behalf.

Before this Act was put into operation, it seems to have been thought desirable to provide also for determining the unopened side road allowances, at the same time as those opened, should be marked and defined upon the ground. Accordingly, the 25th Vic. ch. 38, was passed in 1862, and thereby a special provision was made for determining the unopened side road allowances. The directions given by the statute for that purpose are, that the surveyor making the survey directed by the former Act, shall commence from such posts or monuments as were planted or marked on the original survey for the front angles of such road allowance; or, if such original land marks could not be found, then the surveyor should obtain the best evidence the nature of the case admits of respecting such post, limit, or allowance for side road; and if the same could not be satisfactorily ascertained, then he was directed to measure the distance between the nearest opened roads established by the former Act, or between a side road so established, and the nearest undisputed post limit; and upon taking such measurement, so as to establish the roads in such a manner as to leave an equal breadth for the lots on each side thereof to the nearest established road or original monument. In other words, to lay out the new road allowances so as to make the lots between them, or between one of them and the nearest established road or original monument, of equal breadth.

Now, it is to be observed that the principle here estab-

lished recognizes all the original monuments planted on the original survey. The deviation from the original survey, which is sanctioned, is the course of the side lines, which is made to conform to the courses of those already established and opened.

Again, it is to be observed that some of the posts or monuments which, in establishing the site of unopened side lines, the surveyor is directed to regard as fixed and unalterable, may be posts planted on the original survey between lots.

For the purpose of determining side-road allowances between such a post and the nearest established road allowances, these monuments are fixed, determined, and unalterable. They must, therefore, also be so, as it appears to me, for the purpose of defining the line between the lots, the front angles of which they were planted on the original survey to designate.

This consideration, in my judgment, throws much light upon the intention of the Legislature in the sixth section.

Now, in the case before us, we do not know whether or not original monuments were found determining on the ground the situs of the road allowances east of lot 31 and west of lot 32. For all that appears, these side-line road allowances may be for the whole length of these lots, run precisely in the same position as they were established upon the original survey.

Mr. Passmore himself, with reference to the old fence, upon which the defendants rely as the original boundary, says, that upon the line of it he saw three stumps marked north and south, having three notches. These, he says, represented old line trees. The fence, he says, evidently had been built on some survey; and he could not undertake to say that it was not made from the original monuments.

Now, if this should be the state of the case, I cannot see any principle upon which the line should be determined otherwise than in accordance with the original survey.

If the line was run through upon the original survey,

that line should still, as it appears to me, remain. If it was not originally run through, but was only marked with a post in front, then perhaps the Act would require that the line should be run from the monuments in front in conformity with side road allowances now established, at the east side of lot 31, and the west side of lot 32. But I cannot, I confess, see anything to justify the ignoring the original monument, if its site can be established, as the point from which the line is to be run. The whole principle of the Act is to recognize the original monuments as still binding, and therefore the sixth section of the Act, upon which Mr. Kerr so much relied, must, as it appears to me, be given a construction consistent with that principle.

That section enacts that: The side-lines or limits between lots, as mentioned in the third section of the Act hereinbefore mentioned, shall be drawn so as to give an equal breadth to the lots contained between the monuments hereinbefore established.

That was simply a direction confirmatory of the design of the original survey, which no doubt was to give equal spaces between the side line road allowances. But why in this section is any reference made to the third section of the former Act? If it was intended that, although original monuments were to be respected and maintained as planted on the original survey in all cases, except where they were planted to designate the front angles between lots, and in running the line between lots, it would have been easy and simple to have said, "The side lines and limits between lots shall in all cases be drawn so as to give an equal breadth," &c., without any reference to the former Act. The reference to the third section of the former Act, when giving directions as to running the lines between lots, must have been for some purpose, and the purpose appears to me to be plain when we do refer to that third section; for there we find the direction to be to draw such limit from the post or monument planted upon the original survey to mark the commencement of such line or limit; and should such original post be lost, and no satisfactory evidence exist of

the position of the same, that then the surveyor should proceed as in other similar cases under the law in that behalf, namely, by measuring and dividing the space between the nearest original monuments.

Now, by the new provision, this principle being maintained for the purpose of determining the side-line road allowances by the 3rd sec. of 25 Vic., and those road allowances being made unalterable, there was no occasion to go further in running lines between lots than to the nearest side line road allowances; and as there are only two lots between each, the space is to be divided equally; but if the original monument is in existence, that is to be the starting point; it is not to be disturbed, and the principle, both of the original survey, the scheme of which also was equal division between side-line road allowances, and of the Act, is maintained. This direction, as to dividing equally between road allowances, is, as it appears to me, substituted for the direction in the 3rd sec. of 24 Vic., when the monuments are lost, and satisfactory evidence of their position does not exist.

To stand by the monuments planted on the original survey is the first principle of the general law, and I think also of these Acts. If they are lost, the next is, equal division between side-line road allowances established by the Acts, and which are established upon the basis of original monuments when found being invariably respected and maintained.

The proper conclusion, as it appears to me, to be arrived at in the case is one similar to that arrived at by the Court of Queen's Bench in *Babaun v. Lauson*, 27 U. C. R. 399, namely, that upon this evidence we cannot say that the plaintiff, upon whom the *onus probandi* lay, has made out a clear case that the piece of land for which the defendants defend is part of the plaintiff's lot 31, and the plaintiff therefore should be nonsuited.

I think therefore, that the proper rule to make will be, to enter a nonsuit, unless the plaintiff shall elect within one month to take out a rule for a new trial upon payment of

costs, to enable him to supply, if he can, the evidence in which the case as it at present stands is defective.

The case having been almost wholly argued upon both sides upon the construction of the statute, we are not called upon, in the view which I have taken, to decide the point raised under the Statute of Limitations; but as it seems to me that the claim made by the plaintiff is only a little more than the straightening of an old crooked line, and as the line as proposed by the plaintiff gives to both parties an equal quantity, and as I think the parties will find it to their advantage to come to an amicable arrangement of the dispute, I have no objection, with a view to furthering that end, to express my present impression to be that what the plaintiff did for the purpose of retaking possession in 1865 or 1866 will be found to have the effect of stopping the running of the Statute of Limitations, if upon the piece of land being found to be a part of lot 31, they should have to rest their title upon statutory possession. That a portion of the piece in dispute would be found to be on lot 31, I think highly probable, even if the line should be run from the point in the front angle of the lot which the defendants claim to be the site of the original monument, and which is the point from which the old fence commenced to be run at the south end of the lot, unless it can be proved that the line itself was run through from front to rear upon the original survey, and that the old fence was erected throughout upon such line.

In my judgment, therefore, the rule should be to enter a nonsuit, unless the plaintiff shall within one month elect to take a rule for a new trial upon payment of costs.

HAGARTY, C. J.—It is impossible to feel free from doubt as to the proper conclusion to be arrived at on the very unsatisfactory evidence before us. The land in dispute is trifling in extent, and it is much to be regretted that the litigation should be prolonged.

The plaintiff both at trial and in term rests his right to recover wholly on his construction of the statute.

The defendant objects that it was incumbent on the plaintiff to give some evidence, either that there was no original monument marking the commencement of the side-line, or that it was lost and no satisfactory evidence existing of its position.

Mr. Passmore, who made the statutable survey of the road allowances, and afterwards ran this side-line, can give no evidence of any search or enquiry for any such post. He also tells us of an old fence, and of notched stumps and blazes: that the fence had evidently been built on some survey; and that he could not say that the surveyor had not the original monuments proved when he made his survey; and that line may have been made from the original monument.

I understand him to say distinctly that in running this side line he confined himself strictly to making an equal division of the two lots, by a line drawn equi-distant from the road monuments, several years previously planted by him, and parallel to the courses of such roads.

We have no explanation from Mr. Passmore of the course adopted in ascertaining the position of the side-roads, whether they had been already opened up and travelled, as mentioned in the first Act, or not opened, or marked off for the first time, under the provisions of the second Act, nor from what monuments (if any) he measured east or west of these roads.

All the evidence pointed to an old side-line having been run from a known starting point or monument.

Now any such monument must have been within a very few feet of what it is now contended is the equidistant point from the side roads.

If such a monument existed, or its situation provable, it is hard to believe that the Legislature ever intended that it should be interfered with.

The first Act clearly shews that such was not the intention, and we must require very clear words in the second Act to satisfy us that any other intention was subsequently entertained.

Section 4 in the second Act, in providing for the survey of side-roads not previously opened, directs the measurement of the distance between "the nearest opened," &c., "side-road, or between the side-road so established and the nearest undisputed post limit or monument, as the case may be."

In all this we see no intention of ignoring any original monument.

Then the sixth section directs the side-lines or limits between lots, as mentioned in the third section of the first Act, shall be drawn so as to give an equal breadth to the lots contained between the monuments hereinbefore established.

Taking the two Acts together, I cannot hold that the Legislature intended any original monument to be ignored.

I think the plaintiff here ought not to call on us to hold him entitled to an absolute mathematically exact division of these lots, without proving with reasonable clearness how the roads were laid out, the evidence of his own surveyor strongly pointing to an old survey and fencing of a line, in all probability based upon the original survey and monuments.

I wish to be understood as of opinion that as soon as the plaintiff shewed, if he could shew, how the roads had been established and the statutable directions obeyed, that then he would be entitled to the exact divisions for which he contends.

If the surveyor who laid out the roads had given any evidence to shew that he had ascertained their position, either as being roads already opened and travelled, or, if new roads, then that he had to the best of his ability ascertained their position by reference to the nearest original monuments, I should be satisfied.

But nothing of this kind appears in the evidence as reported to us.

But it may be that we should hold that when the plaintiff has once proved an actual survey and planting of monuments at the side-roads, that the *prima facie* infer-

ence ought to be, that he is entitled to the exact statutable division, and that it then rests on the defendants to shew something to rebut such result, *e. g.*, the existence or proof of situation of an original monument supporting his contention.

The difficulty here is, that the surveyor who made this statutable survey is the witness whose evidence creates the strong doubt as to the plaintiff's right to recover, or to move the old boundary, or that the side-roads were laid out as the Act directs.

It is very probable that if the case be again tried the plaintiff may prove all that is required to uphold his contention.

I must again repeat that it is on the uncertainty of the statements as to the survey as reported to us that I form my opinion.

I am inclined to go further, and hold that if a plaintiff merely proves the fact of the planting of the monuments at the roads, he has made a *prima facie* case. But here the whole doubt and difficulties are created in his attempt to give such proof.

I think under all the circumstances we should direct the case to be tried again, and that the costs should abide the event, as I think both were in fault in eliciting the proper evidence.

As to the Statute of Limitations, I at present agree with my brother Gwynne.

GALT, J.—After the best consideration I have been able to give to this case, I think there should be a new trial, with costs to abide the event.

I fully concur with my brother Gwynne that the *onus probandi* that the land in dispute belongs to him rests on the plaintiff; but I am of opinion that in this case, the onus of proving the existence or non-existence of an original monument has been cast upon the party asserting such to be the case, and that it makes no difference whether such party is plaintiff or defendant, under the peculiar provi-

sions of section 3 of of 24 Vic. ch. 64, and the 6th section of 25 Vic. ch. 38.

The 3rd section enacts that any division line or limit between lots in the said township, (Scarborough), shall be drawn from the post or monument planted in the original survey at the front angle of such road allowance or to mark the commencement of such line or limit, or should such original post or monument be lost, and no satisfactory evidence exist of the position of the same, the surveyor shall proceed as in other similar cases under the law in this behalf.

Had it not been for the subsequent statute, the plaintiff would have been called upon to prove that the line between him and the defendant had been drawn from the post or monument planted in the original survey, or that it had been lost, and no satisfactory evidence could be given of its existence, before he would have been entitled to proceed to an equal division of the land between the two roads; but by the 6th sec. of 25 Vic., the side-line or limits between lots as mentioned in the foregoing section shall be drawn so as to give an equal breadth to the lots contained between the monuments hereinbefore established.

I confess that this enactment appears to me to have been intended to apply to all cases, whether there was an original monument or not, but, at any rate, that it casts the proof of such original monument on the party asserting its existence.

In other words—the plaintiff would be entitled to succeed upon proving an equal division between the monuments referred to in the statute, unless the defendant could prove the existence of an original monument between the lots.

As I have already stated, I do not at present express the opinion that such proof would establish the defendant's case, but I am satisfied that he cannot succeed without it.

*Rule absolute.*

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KOUGH V. PRICE (ASSIGNEE).

*Chattel mortgage—Security against endorsements—Duration of liability—Statement of liability—Affidavit of bona fides—Consol. Stat. U. C. ch. 45, sec. 5.*

In a chattel mortgage to secure the plaintiff, the mortgagee, against certain notes on which he was an endorser, the notes were set out, and were all payable within the year ; but in the recital the mortgage was stated to be executed not only as security against these notes, but also against any note or notes thereafter to be endorsed by the plaintiff for the mortgagor's accommodation by way of renewal of the said recited note, or otherwise howsoever. The proviso was, for the payment of the said notes, and all and every other note or notes which might thereafter be endorsed by the mortgagor for the plaintiff by way of renewal of the aforesaid *note*, or otherwise ; and the covenant was to pay the said *note*, and all future and other promissory notes which the said mortgagee should thereafter endorse for the accommodation of the mortgagor.

*Semble*, that the mortgage was on its face invalid, in not shewing that the liability of the mortgagor was limited in duration to one year, as required by Consol. Stat. U. C. ch. 45, sec. 5 ; but the affidavit made on refiling the mortgage shewed that no such restriction was intended, the notes having been several times renewed, and only a small sum paid on them ; and on this ground therefore the mortgage was held bad.

*Held*, also, that the mortgage was invalid, in consequence of the affidavit of *bona fides* not stating the amount of the liability intended to be created and covered ; for the covenant shewed that it was intended as a security against the notes specified, and any other notes which might be endorsed, and the affidavit stated that it was executed to secure against the payment of such liability.

*Quære*, as to the effect of the word *note*, instead of *notes*, being used in the affidavit and mortgage.

A second mortgage for the same reasons was also held bad.

A third mortgage, subsequently given, contained nearly all the notes referred to in the above mortgages, while it not only appeared that none of such notes were then in existence, they having all been renewed several times and reduced in amount, but that it also contained a further note which was not endorsed at all.

*Held*, that this mortgage was also bad, as it could not be said to contain a true statement of the plaintiff's liability.

THIS was an action brought by the plaintiff against the defendant, the official assignee of the estate of McKenzie & Black, insolvents, for trespass to, and the conversion of certain goods claimed under three chattel mortgages executed by the insolvents in his favour.

From the evidence it appeared that the plaintiff had made arrangements with the insolvents to receive a sum of 7 per cent. for endorsing for them. He was to have the chattels in security, but they were to have control of them,

if necessary selling the wood to the steamboats, and paying the money in discharge of the notes.

The first mortgage was given on the 22nd of December, 1874, to secure the plaintiff against certain notes therein specified, on which he was an endorser.

The recital was: "And whereas, the said parties of the first part have agreed to execute these presents for the purpose of indemnifying and saving harmless the said party of the second part from the payment of the said promissory notes, or any part thereof, or any note or notes hereafter to be indorsed by the said party of the second part for the accommodation of the said parties of the first part by way of renewal of the said recited *note*, or any interest to accrue thereunder, or otherwise howsoever."

The proviso was: "Provided always, that if the said parties of the first part, &c., do and shall pay or cause to be paid the said promissory notes, as aforesaid, endorsed by the said party of the second part, copies wherof *is* hereinbefore set out; and shall pay, or cause to be paid, all and every other note or notes which may hereafter be endorsed by the said party of the second part for the accommodation of the said parties of the first part by way of renewal of the aforesaid *note*, and all interest in respect thereof, or otherwise, and pay, indemnify, and save harmless the said party of the second part from all loss in respect of the said *note*, or renewals, then these presents shall cease," &c.

The covenant was: "The parties of the first part do covenant, promise, and agree, to and with the said party of the second part," &c., "that the said parties of the first part," &c., "shall and will pay or cause to be paid the said promissory *note* before mentioned, and *and all future and other promissory notes*" (not saying by way of renewal of the notes mentioned in the mortgage), "which the said party of the second part shall hereafter endorse for the accommodation of the said parties of the first part, and all interest and incidental expenses to accrue thereon as aforesaid, and indemnify the said party of the second part from all loss, costs, charges, damages, or expenses in respect thereof."

The affidavit of *bona fides* was made by the plaintiff and stated: "I, W. K.," &c., "make oath and say that the above mortgage truly sets forth the agreement entered into between me, this deponent, and the said mortgagee therein named, and truly states the extent of the liability intended to be created by such agreement, and covered by such mortgage; and that the same was executed in good faith and for the express purpose of securing, &c., the said mortgagee therein named against the payment of the amount of such liability for the said mortgagors by reason of the said promissory *note* therein recited, or any future note or notes which I may endorse for the accommodation of the parties of the first part, *whether* as renewals of the said recited promissory *note* or *otherwise*," &c.

There was also a second mortgage, dated 22nd of February, 1875, which was similar to the first, except that it contained several notes not mentioned in the first.

There was a third mortgage, dated 25th of November, which was also similar to the other two, and contained all the notes mentioned in the two former mortgages, except one for \$140, one for \$400, and one for \$276, making in all the sum of \$816: whereas, by the affidavit filed on the renewal of the first mortgage, the amount of the notes included in it had been reduced by \$700, and those in the second by the sum of \$854.86, making in all the sum of \$1,554.86. It also included a note for \$477.26, which was not endorsed at all; and it also appeared that with the exception of this last named note, none of the notes therein mentioned was in existence, as described; each of them having been retired and renewed several times.

As, for example, the first for \$750, dated 13th October, 1874, the plaintiff in his evidence said: "The first note, or \$750 note, is No. 230 in my bill book. It was renewed by No. 254; that was renewed by No. 299; that was renewed 22nd July, 1875, by No. 343; that was renewed by (25th September, 1875) No. 375. It stood at \$630 on the 25th November, 1875." This was the day on which the mortgage was executed. Many of the others were in the same position.

At the close of the case a verdict was taken by consent for the plaintiff, subject to the following objections:—

1. That the plaintiff based his claim on three several chattel mortgages, and renewals thereof, made to him to secure the plaintiff against liability for endorsing certain notes set forth in the mortgage made by the insolvents, and discounted for them, all of which notes the evidence shews, as to the first two mortgages, were renewed after the expiration of one year from the date of the mortgages, contrary to the statute Consol. Stat. U. C. ch. 45, sec. 5, and which first mentioned mortgages were, in consequence, at the time of the alleged trespass absolutely void.

2. That neither of the three mortgages shews sufficiently, by recital or otherwise, the terms on which the said notes were endorsed. The said mortgages respectively shew that the parties thereto contemplated renewing the said notes from time to time; but they do not shew that the said notes were to be paid within one year from the making of the said mortgages respectively.

3. That the first two mortgages were void as against the general creditors of the insolvents, in consequence of the affidavits of *bona fides* being respectively defective. The said respective mortgages having been taken, as appears on the face thereof, to secure the plaintiff against the endorsement of several promissory notes, whereas the said respective affidavits refer in the singular number to the endorsement of a note.

4. That the third mortgage is void, as the evidence shewed that all the notes therein referred to were the same notes as referred to in the two previous mortgages, with the exception of the last note therein, which last note is for the sum of \$477.26, and which was never endorsed by the plaintiff or discounted, although it was in like manner with the other notes referred to in the said mortgage as an endorsed note; and as to the other notes referred to in the said mortgage, the evidence shewed that at the time of the taking of the said mortgage some of them had been paid in full, and that all of them had been renewed from time

to time, and reduced in amount; and that in fact the notes referred to in the said mortgage were, at the time of the taking thereof, not in existence as notes, having at the said time been replaced by renewal notes for reduced amounts and no binding agreement for such renewals had been entered into between the parties.

The 5th, 6th, and 8th objections need not be considered.

7. That the said action could not be sustained, the goods in question at the time of the taking possession by the assignee, having been found in the possession of the said insolvents, and the said plaintiff should have proceeded under section 125 of the Insolvent Act of 1875.

In Michaelmas term, November 20th, 1876, *McMichael*, Q. C., obtained a rule *nisi* under the Law Reform Act to set aside the verdict entered for the plaintiff and enter a verdict for the defendant.

In this term, December 6th, 1876, *Robinson*, Q. C., shewed cause. The mortgages are valid and subsisting within the meaning of section 5 of the Chattel Mortgage Act, Consol. Stat. U. C. ch. 45. All the Act requires is that the debt should accrue due and be payable within the year; and the notes here were all to so accrue due and be payable. There is nothing to prevent the parties by a subsequent agreement extending the time beyond the year. It is not necessary to recite that the debt is to be payable within the year, so long as it does not appear that the debt is to be payable after the year: *Fraser v. Bank of Toronto*, 19 U. C. R. 381. *Turner v. Mills*, 11 C. P. 366, would appear to support the defendant's contention; but this point was not necessary for the decision of the case. The affidavits of *bona fides* are valid. The leaving out of the "s," in notes, cannot of itself render the affidavit defective. It refers to the mortgage and the recitals therein, and this clearly shews that notes were intended, and not a note. *Harding v. Knowlson*, 17 U. C. R. 564, is quite distinguishable, as by leaving out of the "s," in creditors, the affidavit might apply to one and not to all the creditors.

As to the third mortgage, even if the mortgage is bad as far as the \$477.26 note is concerned, it does not avoid the rest of the mortgage. The Act does not avoid the whole mortgage because there may be an untrue statement in it as to one of the notes: *Tyas v. McMaster*, 8 C. P. 446; *Mathers v. Lynch*, 28 U. C. R. 354; *Becher v. Austin*, 21 C. P. 334; *Rob. & Jos. Dig.* 576-9. There was a sufficient description of the goods: *Re Thirkell*, 21 Grant 492; *Rose v. Scott*, 17 U. C. R. 385; *Sutherland v. Nixon*, 21 U. C. R. 629; *Hiscott v. Murray*, 12 C. P. 315; *Rob. & Jos. Dig.* 587-91. Then as to possession. The evidence shews that the mortgagee had taken possession of the goods, and then placed them in the possession of the mortgagor's son, as his agent, with instructions to sell them for him if possible; and it appears that this was the best thing that could be done. There was therefore a sufficient taking possession, and section 125 of the Insolvent Act of 1875 does not apply: *Harris v. Commercial Bank*, 16 U. C. R. 437; *Foster v. Smith*, 13 U. C. R. 243; *Gildersleeve v. Ault*, 16 U. C. R. 401; *Burton v. Bellhouse*, 20 U. C. R. 60; *Rob. & Jos. Dig.* 582. In *Chamberlain v. Green*, 20 C. P. 304, there was no actual possession taken, and the lease to the mortgagor was merely colourable. In *Doyle v. Lasher*, 263, there was also no possession taken, and besides no chattel mortgage was ever executed or registered. The principle, therefore laid down in *Dumble v. White*, 32 U. C. R. 601, does not apply. See also *Rob. & Jos. Dig.* 421-2; *Munro v. Commercial Building Society*, 37 U. C. R. 464.

*McMichael*, Q. C., contra. Under the Chattel Mortgage Act, the debt must be an existing debt created at the time of the mortgage or previously, and payable within the year, or it may be for future advances, under section 5, to accrue due during the year, or for endorsements or liabilities incurred at the time, and also payable within the year; and the mortgage must specify that they will so fall due during the year. The object is to give the public notice of the amount of liability. There is no power to agree for future endorse-

ments. Also at the time the mortgage is refiled the debt must be matured, and it cannot be for renewed notes ; at all events the mortgage must state that they were to be renewed : *Turner v. Mills*, 11 C. P. 366. For these reasons the two first mortgages are therefore clearly bad. They are also bad on account of the defect in the affidavit of *bona fides* in referring to a note, and not to notes ; and the cases shew that the leaving out the "s" is material. As to the third mortgage, it is clearly bad, the note for \$477.26 has never been endorsed at all, while the other notes had been renewed and reduced in amount ; and the affidavit of *bona fides* to this mortgage clearly cannot be sustained. As to possession, possession never was taken, as it cannot be said that the telling the son to hold possession is such a taking. The plaintiff, therefore, should have proved under section 125 of the Insolvent Act of 1875 : *Dumble v. White*, 32 U. C. R. 601 ; *Rob. & Jos. Dig.*, 421-2.

February 5th, 1877. GALT, J., delivered the judgment of the Court.

By sec. 5 of ch. 45 Consol. Stat. U. C., it is enacted : "In case of an agreement in writing for future advances," &c., "or in case of a mortgage of goods and chattels for securing the mortgagee against the endorsement of any bills or promissory notes or any other liability by him incurred for the mortgagor, not extending for a longer period than one year from the date of such mortgage, and in case the mortgage is executed in good faith, and sets forth fully, by recital or otherwise, the terms, nature, and effect of the agreement, and the amount of liability intended to be created," &c., "and is accompanied by the affidavit of the mortgagee," &c., "stating that the mortgage truly sets forth the agreement entered into between the parties thereto, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage," &c., "such mortgage shall be as valid and binding as mortgages mentioned in the preceding section of this Act."

As to the first and second objections taken, the first question that arises as respects the first mortgage is: "Does it by recital or otherwise set forth the terms, nature, and effect of the agreement between the parties, and the amount of liability intended to be created.

This question must be answered from a consideration of the terms of the instrument itself.

It appears to me the statute imperatively requires at the time when the mortgage is given it should be limited, as respects the liability, in duration to one year. This has not been attended to in the recital in the mortgage in this case. The recital is, that the mortgagors have agreed to execute it for the purpose of indemnifying and saving harmless the mortgagee from the payment of the notes therein mentioned, or any part thereof, or any note or notes hereafter to be endorsed by him for the accommodation of the mortgagors by way of renewal of the said recited *note*—no reference being made or restriction as to time. And, if we look at other portions of the mortgage, we find that in the covenant, which is certainly the agreement between the parties, the parties of the first part covenant, not only that they will pay the *note* before mentioned (meaning thereby the notes set out in the mortgage), but "all future and other promissory notes which the said party of the second part shall hereafter endorse for the accommodation of the parties of the first part"—no limitation, either as to time or extent of liability, being mentioned.

This is certainly not in accordance with the express provisions of the statute, which requires that in the original agreement there should be a limitation as to the amount. If the mortgagee is called upon to pay the endorsements during the year, his security would of course continue. See *Fraser v. Bank of Toronto*, 19 U. C. R. 381.

But, as appears from the judgment of Sir J. B. Robinson, C. J., it would have been otherwise if there had been no limitation as to time. He says, at p. 387: "The fact appeared to be clearly made out that McDermott & Walsh

were indebted to Fraser, or liable to him as endorser of their notes, to the amount mentioned in the mortgage, and that there were none of the endorsed notes out at the time of the mortgage being given, which had anything like a year to run. As they fell due most of them were renewed by notes given by Fraser, to which McDermott & Walsh were not parties, so that in effect he assumed the debts, and became debtor in their place to their bank. We think there was nothing in that which invalidated the security Fraser had taken, as being contrary to the third section of the Chattel Mortgage Act, for the mortgage was not taken in the first place, nor kept on foot afterwards, as a security against a liability which he had assumed on account of McDermott & Walsh upon a contract which as between him and them extended their liability beyond the year. He had merely for his own convenience obtained further time from the bank."

In that case the mortgage recited that Fraser was endorser upon certain promissory notes which would become due within a year from the date of the mortgage.

In the case now before us the notes are set out, and all of them would fall due within a period of less than three months, and so far no objection could be taken ; but in the recital the agreement is stated to be that the mortgage was executed, not only to secure the mortgagee from harm as respects those notes, but also as regarded any other note or notes which might thereafter be endorsed by him as renewals ; and there is nothing in any part of the instrument to shew that the intention of the parties was to restrict its operation and the liability of the mortgagee to one year.

I think, therefore, that on the face of the instrument it is defective.

But we are not called upon to decide the case on the construction of the mortgage itself alone, for the evidence proved that the very evil which the statute intended to prevent had arisen in this case. The mortgage was re-filed on 9th December, 1875, and the affidavit of the mortgagee

shewed that only \$700 had been paid on these notes, and also that each of the notes had been several times renewed.

I am therefore of opinion that the first and second objections taken by the rule are entitled to prevail.

As respects the third objection, namely, that the affidavit refers only to the endorsement of a single note, it is very singular that throughout the whole instrument the same mistake occurs. It does so in the recital, in the proviso, and in the covenant.

It is not, however, necessary to consider the affidavit, as regards this point, for it is clearly defective in another much more important respect.

The Legislature expressly requires that in the affidavit the amount of liability intended to be created should be stated. This has not been done here. The covenant is, that the parties of the first part will not only pay the *note* previously mentioned, "but all future and other promissory notes (not confining them to renewals) which the said party of the second part shall hereafter endorse for the accommodation of the parties of the first part," and the affidavit is, that the mortgage "was executed in good faith, and for the express purpose of securing me against the payment of the amount of such liability for the said mortgagor by reason of the said promissory *note* there recited, or any future note or notes which I may endorse for the accommodation of the parties of the first part, *whether* as renewals of the said recited promissory *note* or *otherwise*." The latter expression can have no reference except to the future endorsements mentioned in the covenant, and therefore the affidavit is defective in not stating "the amount of the liability intended to be created by such agreement and covered by such mortgage."

The second mortgage is open to the same objection as the first, as both are the same, with the exception of the second including several notes not mentioned in the first.

Then as respects the third mortgage, dated 25th November, 1875, this is clearly void, not only for the same objection, but because it cannot be said to contain a true

representation of the liability of the mortgagor. All the notes mentioned in the two former mortgages are included in this, with the exception of one for \$140, one for \$400, and one for \$276, making in all the sum \$816, whereas by the affidavit filed on the renewal of the first mortgage the amount of the notes included in it had been reduced by \$700, and those in the second by the sum of \$854.86, making in all the sum of \$1,554.86. It moreover includes a note of \$477.26, which was not indorsed at all, and none of the notes mentioned therein, with the exception of that for \$477.26, was in existence as described; each of them had been retired and renewed several times, so that it cannot be said that the mortgage contains a true statement of the liability of the mortgagee, and, consequently, it is void.

As we are of opinion, for the above reasons, that all the mortgages are void, it is unnecessary to consider the other branches of the rule.

The rule will therefore be absolute to enter a verdict for the defendant.

*Rule absolute.*

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## LE BANQUE NATIONALE V. SPARKS.

*Promissory note—Stamps—Endorsement in blank—31 Vic. ch. 9, sec. 4, D.—  
37 Vic. ch. 47, secs. 3, 12, D.*

On the 9th September, 1875, defendant endorsed a promissory note made by S. & C., bearing that date, and payable to him four months after date at the plaintiffs' branch at Ottawa, but without any amount being filled in. On the same day, C. deposited it with the plaintiffs, authorizing them to fill it in for the amount of S. & C.'s then due paper, as also for other paper falling due before the 22nd October. On the 21st October, the plaintiffs filled in the note for \$4,835.84, which included defendant's then due paper, a sum of \$2,000 coming due on the following day, and \$2.94, the amount of the stamps, which they then affixed. The stamps so affixed were sufficient to cover double duty, and were obliterated by writing across them the date on which they were so affixed, namely, 21st October, 1875.

*Held*, that defendant, by so endorsing the note, authorized plaintiffs, as *bona fide* holders for value, to fill in the amount, and to affix and cancel the requisite stamps in the mode required by law; and that the note then became a completed note, but speaking from its original date, from which the four months would be counted.

By 37 Vic. ch. 47, sec. 3, D., it is provided that in case of a bank making or becoming the holder of a note not duly stamped, and knowing the same, and not immediately affixing and cancelling the proper stamps, within the meaning of 31 Vic. ch. 9, it should not only forfeit a penalty of \$500, but be unable to recover on such note, or make it available for any purpose whatever, and that it should be of no effect in law or equity.

*Held*, that the stamps here were not properly cancelled; for if affixed as agents of the makers, which the including them in the amount of the note was evidence of, then, under sec. 4 of 31 Vic. ch. 9, D., the date of the obliteration must accord with that of the note; whereas, if looked upon as subsequent holders, and as affixing double duty, then under sec. 12, as substituted by 37 Vic. ch. 47, sec. 2, the initials or name as well as the date are required.

*Semtle*, that the privileges accorded by the latter part of this substituted sec. 12 to holders who from error or mistake do not at the proper time affix the double duty, does not apply to banks, &c.

THE declaration was on a promissory note for \$4,835.84, dated the 9th of September, 1875, payable four months after date, made by Sparks & Crawford to the defendant, endorsed by the defendant to one Stanislaus Robert, and by him endorsed to the plaintiff, averring its presentment for payment, and dishonour and notice thereof to the defendant, and non-payment by him.

Pleas. The first and fourth pleas were struck out by a Judge's order. The second and third pleas denied respec-

tively the endorsements of the defendant, and Stanislaus Robert.

5. In substance, that the plaintiffs had been the holders of a promissory note for a smaller amount made by Sparks & Crawford and endorsed by the defendant, and this note being overdue the defendant endorsed a note in blank to procure a renewal, and that it was filled in to a larger amount in fraud of the defendant, of all of which the plaintiffs had notice.

6. That the said promissory note was made in Canada, and as such was liable to have affixed thereto adhesive stamps, or to be written or printed on stamped paper, according to the statutes of Canada in that behalf; but the said promissory note was not, at the time of its being made, stamped at all, nor written on stamped paper in pursuance of said statutes, nor was it, subsequent to its making, double stamped by the said firm of Sparks & Crawford, by the defendant, or by the said Stanislaus Robert, in pursuance to said statutes; and the plaintiffs, when they took, accepted, and became the holders of said promissory note from the said Stanislaus Robert, were aware that it was not when made duly stamped, or written on stamped paper, and the plaintiffs further neglected to affix such double duty by stamps, as soon as they became aware of its not being duly stamped or written on stamped paper when made, and said promissory note is therefore void in law and equity.

#### 7. Payment.

##### Issue.

The cause was tried before Moss, J., without a jury, at Ottawa, at the Fall Assizes of 1876.

From the evidence it appeared that upon the 9th September, 1875, one John Crawford, a member of the firm of Sparks & Crawford, procured the defendant, Jonathan Sparks, not a member of the firm, and one Stanislaus Robert, to endorse a piece of paper partly printed and partly written, and bearing date the said 9th September, 1875, which was as follows:—

"OTTAWA, 9th September, 1875.

"Four months after date, we promise to pay to the order of Jonathan Sparks, at the National Bank here \_\_\_\_\_ dollars, for value received."

"SPARKS & CRAWFORD."

Endorsed by Jonathan Sparks and Stanislaus Robert.

Crawford, according to his own statement, left this piece of paper perfect in everything as a promissory note, save that it had no amount stated in it, and no stamps affixed to it, on the said 9th September, with the plaintiffs, authorizing them to insert therein, not only the sum of \$1,307, or thereabouts, which the firm of Sparks & Crawford owed them upon overdue paper, but also a further sum, exceeding \$2,500, coming due from them to the plaintiffs, upon paper maturing between that day and the 22nd October.

The evidence upon this subject is given by the plaintiffs' agent, who said that he put the stamps upon the note when he filled in the sum of \$4,835.84, as the amount of the note, upon the 21st October, which amount represented the amount then overdue to the plaintiffs from Sparks & Crawford, the further sum of \$2,000 coming due from them on the following day, namely, the 22nd October, and the sum of \$2.94 for stamps, which were affixed by the plaintiffs' agent, and the amount charged to the note, and across the stamps was written the date on which they were affixed, namely, the 21st October, 1875.

For the defendant it was objected that the note was only blank paper when given to the bank, and the agent filled it up; that the bank should have been put upon enquiry; and that the stamps not being affixed at the time when the agent filled up the note, the plaintiffs must fail.

For the plaintiff it was contended that the stamps would have been sufficient, even if single: that the bank had no notice of any limitation, even if there was such limitation, which was denied.

The learned Judge entered a verdict for the plaintiffs.

In Michaelmas term, November 22nd, 1876, *McMichael*, Q. C., obtained a rule *nisi* under the Law Reform Act, to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant.

In Michaelmas term, December 4th, 1876, *Snelling* shewed cause. The cases are clear that a person endorsing a note in blank authorizes any person into whose hands it comes to fill it in to any amount he pleases. The only question therefore is, have the Stamp Acts been complied with. The 3rd sec. of 37 Vic., ch. 47, D., which applies to bankers and brokers alone, expressly enacts that notwithstanding anything in the Acts before mentioned or this Act, such bank or broker, whether as maker or as a subsequent holder, shall cancel the stamp, as provided by 31 Vic. ch. 9. The note here did not become a perfect note until the 21st of October, when the bank agent filled in the amount of it, and the stamps were then affixed and cancelled as of that date. It is not necessary, under sec. 4, that the date of the stamp should accord with that of the note, so long as it appears that the stamps have been in fact cancelled; for it is expressly stated that the object of cancellation is to shew that the stamps have not been before used, and to prevent their further use. Therefore so long as the spirit of the Act is complied with, it is sufficient. The plaintiffs may however be looked upon as subsequent holders, the stamps being sufficient to cover the double duty, and the writing of the date alone was a sufficient cancellation within the terms of sec. 11 of 31 Vic. ch. 9. Sec. 12 of 37 Vic. ch. 47, which requires both the initials and date, does not apply to banks.

*McMichael*, Q. C., contra. The bank were only authorized to fill in the note for the amount of the note due by Sparks and Crawford when defendant endorsed it; and they had no authority to hold it until other notes matured due. If the note so filled in were in the hands of a *bona fide* holder for value without notice, the defendant no doubt would be liable. If the note be looked upon as a guarantee, then it should have been filled in at the time of

defendant's endorsement. Then as to the stamps. If the plaintiff be considered as filling in the note and affixing the stamps as the agents of the maker, he must therefore comply with the provisions as to single duty, and the date on the stamps must accord with that of the note. If the plaintiffs claim to be subsequent holders, then the note must relate back to the day of its date, and the plaintiffs holding it in the interval did so with the knowledge of no duty having been paid upon it, and therefore cannot avail themselves of the provisions in the statutes as to error or mistake. However, under 37 Vic. ch. 47, sec. 3, these provisions do not apply to them. Assuming however that as subsequent holders they were entitled to put on double duty, they have not cancelled the stamps as required. Sec. 12 of 37 Vic. ch. 47, by which the sec. 12 in the former Acts is repealed, and this sec. 12 substituted therefor, requires both the date and the initials to be written on the stamps; and this section is clearly applicable to banks: *Young v. Waggoner*, 29 U. C. R. 35; *Waterous v. Montgomery*, 36 U. C. R. 1.

February 5th, 1877. HAGARTY, C.J.—The case of *Russel v. Langstaffe*, 2 Doug. 514, before Lord Mansfield, is cited in all text books, and in a large number of cases, as settling the law as regards an acceptance or endorsement on a blank piece of paper.

One Galley, having had many dealings with the plaintiff, a banker, and having overdrawn his account, was refused a further advance by the plaintiff without an approved endorser. On this Galley applied to the defendant, who endorsed his name on five checks made in the form of promissory notes, but in blank, *i. e.*, without any sum, date, or time of payment being mentioned in the body of the notes.

Galley afterwards filled up the blanks with different sums and dates, as he chose, and the plaintiff discounted the notes. It also appeared that the plaintiff knew the notes were blank at the time of the endorsement.

It was objected that the notes being blank at the time of endorsement, they were not then notes, and no subsequent act of Galley could alter the original nature or operation of defendant's signature, which when written was a mere nullity.

After verdict and argument in term, Lord Mansfield said, p. 516 : "There is nothing so clear as the first point. The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Galley to any amount, and I will be his security.' It does not lie in his mouth to say the endorsements were not regular."

*Collis v. Emett*, 1 H. Bl. 313, recognises this case.

In *Crutchley v. Clarence*, 2 M. & S. 90, a bill was drawn abroad on a person in England. The name of the payee was left blank. It was negotiated and endorsed to the plaintiff, who inserted his own name as payee.

Lord Ellenborough said, that by leaving the blank he undertook to be answerable for it when filled up in the shape of a bill.

Bayley, J., said that the issuing the bill in blank, without the name of the payee, was an authority to a *bonâ fide* holder to insert the name.

*Crutchly v. Mann*, 5 Taunt. 529, was an action on the same bill against the maker.

In *Snaith v. Mingay*, 1 M. & S. 87, partners in Ireland signed as drawers four bills, leaving blanks for date, sums, times when payable, and names of drawees, and sent them to one of their firm who carried on in England a separate business, and also transacted the business of the firm of drawers. These bills were to be used by him on his separate account. Wallace filled up the blanks. They had proper Irish stamps, but insufficient English stamps. The bills were accepted by drawees, and the defendant endorsed them for the benefit of one C., by whom they were endorsed to the plaintiff, who discounted them without notice of the circumstances.

All the Judges held that when the bills were made complete in form, they became by relation Irish bills, the bills

of the parties in Ireland, as if they had been drawn in all their particulars with their own hands.

Bayley, J., said, that when the whole was filled up, it had reference to the time of the signature in Ireland.

See also *Temple v. Pullen*, 8 Ex. 389; *Mulhall v. Neville*, 8 Ex. 391 note; *Usher v. Dauncey*, 4 Camp. 97; *Attwood v. Griffin*, 1 Ry. & M. 425; *Montague v. Perkins*, 22 L. J. N. S. C. P. 187.

*Schultz v. Astley*, 2 Bing. N. C. 544, is a strong case, approving of *Russel v. Langstaffe*.

*Abrahams v. Skinner*, 12 A. & E. 763, recognized *Snaith v. Mingay* as good law on the doctrine of relation, but distinguished it. A blank acceptance was given in 1833, on paper stamped with a then proper die. From and after November 30th, 1833, a new stamp die was appointed by law, and the statute declared that all instruments written on paper stamped with the old die, not executed or signed by any party thereto before that day, should be deemed to be written on paper not duly stamped. The bill appeared to be drawn on the 14th August, 1835, after the new law came into force.

The Court considered the bill had no existence up to the day the law was altered. And Lord Denman held that, independently of any doctrine of relation, it was clear the bill fell directly within the words and meaning of the statute. He pointed out a distinction between the accepting and the drawing of a bill of exchange; and held, "there was a substantial distinction between a blank drawing and a blank acceptance, as regards the doctrine of relation." That acceptance was not essential to the completeness of the instrument, and no reason for holding that acceptance should draw back to itself by relation, the time of drawing the bill, where in fact it had preceded it.

The judgment of the Court in *Montague v. Perkins*, 22 L. J. N. S. C. P. 187, is very full on the general law, fully recognizing the doctrine of *Russel v. Langstaffe*.

I refer to *Byles on Bills*, 12th ed., 88, 165, 189, *Bayley on Bills*, 6th ed., 168, 388: "If a man indorse a bill or note before

the sum or time of payment be mentioned therein, he will be precluded from saying that his indorsement was prior to the completion or issuing of the bill or note: and this, though the holder knew when he took it in what state the bill was at the time of the indorsement," citing *Russel v. Langstaffe*; *Usher v. Dauncey*, 4 Camp. 97, &c.

I think that this note when filled up must be taken to be a note complete as of the 9th September, its actual date.

The defendant gave it or allowed it to pass into the maker's hands with an authority to fill up the existing blanks.

The authorities hold, as I read them, that the blank may be filled up by any holder for value.

On this being done, either by the maker or Benoit, the plaintiffs' agent, it became a note made as of the 9th September, and in its completed state the plaintiff became the holder on the 21st of October.

In Lord Mansfield's language, the defendant said in effect, "Trust Crawford & Sparks to any amount, and I will be their security." In other words, "any person taking this piece of paper from C. & S. may fill it up to any amount of the consideration money from him to them, and I will be security therefor."

But the note, when so completed, must necessarily be regarded as speaking from its original date, and payable in the four months originally stated therein.

As far as the bank is concerned its "holding" of the note must be held to commence when the filling in the amount first made it effectual, and it then became their property by transfer from the makers.

Where stamped paper is used, the acceptor, maker or endorser is protected against any filling up of the incomplete document beyond the amount covered by the stamp.

The use of adhesive stamps, and the exemptions in our stamp Acts in favour of holders who duly affix double duty, destroy this protection.

But we cannot therefore hold that the principles laid down in the English cases do not therefore apply.

In *Russel v. Langstaffe*, there is no mention whatever of stamps. The case was decided in 1780.

There is no pretence here for holding that the plaintiffs had any notice of any limit as to the filling up of the note. They also appear to be holders for value, giving time to the makers.

It remains to consider the objection on the Stamp Act to the extent of that note on all the paper matured to the 21st of October included therein. The plaintiffs here on becoming the holders of an unstamped note, being a bank, were bound immediately to affix proper stamps.

The 37 Vic. ch. 47, is the last statute on stamps.

Section 3 directs that "Any bank or any broker who makes, draws, \* \* or receives, or becomes the holder of any instrument not duly stamped \* \* knowing the same not to be duly stamped, and who does not immediately on making \* \* or becoming the holder of such instrument, *affix thereto and cancel the proper stamps within the meaning of the Act*, 31 Vic. ch. 9, shall incur a penalty of \$500 for every such offence; and shall not be entitled to recover on such instrument, or to make the same available for any purpose whatever; and any such instrument shall be invalid and of no effect in law or equity."

We have now to enquire what were the proper stamps, and how were they to be cancelled within the meaning of 31 Vic. ch. 9.

It must be observed that the last Act imposes on banks and brokers a fivefold penalty, viz., \$500, instead of \$100.

Does the clause mean the "proper stamps" for a note of that amount in the first instance, which a maker should put on, or double stamps, as in the case of an after holder?

The penalty equally applies to making, drawing, negotiating, or becoming the holder of any instrument not duly stamped.

Is it intended to place the banker making or issuing a note in exactly the same position as if he becomes the holder?

If the banker or broker make a note, there seems no reason for his paying more than a single duty.

If he became the holder of a note not duly stamped, the ordinary course would be to affix double duty.

It may be that the Legislature took the view that bankers and brokers, being the parties most conversant with bills and notes, and with stamp Acts, should under a five-fold penalty be subject to the general rule of at once putting on the proper legal duty, whether they were making the note in the first instance or becoming holders of it under any circumstances, if not previously duly stamped, and that nothing being said in the clause about double duty, and "making" and "becoming the holder" being used in the same sentence as involving the same heavy consequence, would apparently favour such a reading.

If we read it as directing that on the "making" of a note the ordinary single stamps are to be affixed and cancelled as directed by the 31st Vic. ch. 9, and, on becoming a holder, the double stamps required by that Act, a serious difficulty at once arises.

In the present case the bank becomes the holder of a note not duly stamped bearing a date prior thereto.

By that Act, section 4, it is provided that "If no integral part of the instrument, nor any part of the signature of the maker," &c., "be written thereon, nor any date be so stamped or written thereon, *or if the date do not agree with the date of the instrument, such stamp shall be of no avail,*" &c.

Here the note is dated 9th September, and the stamps are cancelled with the date 21st October, so the section is not complied with.

Then if we turn to the section as to the subsequent holder in the Act of 31 Vic. ch. 9, sec. 11, we find it provided that the subsequent holder may, at the time of becoming holder, affix double stamps, "and by writing his signature or part thereof, *or his initials, or the proper date,* on such stamp or stamps, in the manner and for the purposes mentioned in the fourth section of this Act."

If the 11th section govern, it would seem that the cancellation here by simply writing "the proper date," (*i.e.* the date of becoming holder), on the stamps would be sufficient.

But when we turn to 33 Vic. ch. 13, we find sections 11 and 12 of 31 Vic. expressly repealed, and two sections numbered 11 and 12 declared to be substituted therefor.

Section 11 provides for a penalty for making, &c., or becoming a party to a note, &c., before the duty or double duty as the case may be, has been paid by affixing stamps and for invalidating it, except in the case of payment of double duty *as in the next section provided*; and in prosecuting for penalty the fact that no part of the signature of the party charged, &c., is written over the stamp, *or* that no date, *or* a date, that does not correspond with the time when the duty ought to have been paid, is written on the stamp, shall be *prima facie* evidence, &c.

Section 12 provides that a subsequent party or holder without becoming a party may affix the double stamps, and by writing his signature or part thereof, or his initials, *or* the proper date on such stamps, &c.

Then the last Act, 37 Vic. ch. 47, sec. 2, enacts that this section 12 substituted by the Act of 33 Vic. for section 12 of 31 Vic. is repealed, and a new section, numbered 12, substituted therefor.

This new section directs that any holder may pay double duty by affixing double stamps, and by writing his initials thereon, *and* the date on which they were affixed. It then provides, as a further measure of relief, that where in any suit a question is raised as to duty not being paid at all, or by the proper party, or at the proper time, or any formality as to date or erasure of stamps having been omitted, or a wrong date placed thereon, and the holder, when he became holder, had no knowledge of such defects, the instrument is held valid, if it appears that the holder, when he became such holder, had no knowledge of such defects, and pay double duty as soon as he acquired such knowledge, though the knowledge be obtained only during the suit, and if it appear to the Court that it was through error or mistake, and not *mala fide*, &c., and the holder may affix the double stamps as soon as he is aware of the error.

So the Act 33 Vic. substitutes two new sections, 11 and 12, for the repealed sections 11 and 12 of the Act of 31 Vic.

Then 37 Vic. repeals the substituted section 12, and substitutes another section 12 therefor.

Section 11, therefore, of 33 Vic. is left standing.

After this last section 12 in 37 Vic. comes the sections as to banks and brokers, and it begins: "Notwithstanding anything in the Acts before mentioned" (that is 31 and 33 Vic.), "or in this Act, any bank or broker," &c.

It would seem that the peculiar privilege given to holders who, from error or mistake, do not at the proper time affix the double stamps as allowed by this new section 12 is specially taken away from banks and brokers, and a five-fold penalty is inflicted on them for not *immediately* putting on the proper stamps on their becoming holders.

The last section 12 is to be read, we must presume, as part of the Act 31 Vic. The repealed section of 33 Vic. was so to be read, and the new section is substituted therefor.

Then, as we must now read 31 Vic., the cancellation of the stamps to be affixed by the maker or original party must, where the name or initials are not written thereon, bear a date agreeing with the date of the instrument.

Where this has not been, or cannot be done, then the only provision for a subsequent holder putting on and cancelling double stamps, seems to be "by writing his initials on such stamp or stamps, and the date on which they were affixed": 37 Vic. ch 46.

The Legislature in the two successive Acts, 33 & 37 Vic., preserve the first Act, 31 Vic., as the General Stamp Act, as amended by the subsequent legislation.

In this new clause, section 3 of the last Act, they apply a more stringent obligation on bankers and brokers. If they make a note they must immediately stamp and cancel within the meaning of 31 Vic. If they become the holders of an unstamped note, they must immediately affix and cancel the proper stamps within the meaning of 31 Vic.

We have to read the words, "the 31st Victoria: as we now amend it."

Therefore it seems difficult to avoid the conclusion that these stamps have not been cancelled as required by that Act.

If the bank here can be treated as the makers of the note, their manager having filled up the blank sum, the date varies from the date of the instrument. If treated as subsequent holders, the initials or name have not been put on them.

We cannot say that it is wholly unimportant to require the name or initials as well as the date, the object being to secure proof that the stamps were cancelled by the bank or some one acting for the bank at the named date.

There need be no difficulty in the case of a bank. The initials of the bank could easily be put. Possibly the initials of the official might suffice.

I think we are compelled to hold that the stamps are not properly cancelled.

No objection was raised as to the form of the 6th plea. See *Young v. Waggoner*, 29 U. C. R. 35, as to form of plea raising the question of "cancelling." If necessary we should amend it. According to *Young v. Waggoner* no amendment would be required.

GWYNNE, J.—Although the defendant is estopped from denying that the promissory note as declared upon was a perfect note upon the 9th September, of which day it bears date, he is not estopped from shewing that it was not then or ever properly stamped, within the meaning of the Stamp Acts.

It cannot now be disputed that, according to the English decisions, a person, endorsing a piece of paper in the condition in which this was when endorsed by the defendant, must be held to give to any person into whose hands it comes for value, authority to insert in the note, as the amount for which he will be responsible, any sum which the stamp on the paper, at the time of his endorsing, will warrant, but he does not authorize any person to insert a sum in excess of that warranted by the stamp.

In England, the stamp upon the paper is his protection, and his only protection, that a greater amount cannot be inserted than is warranted by the stamp.

By a parity of reasoning, we must hold in this country, where the stamp is not upon the paper but is affixed by adhesive stamps, that a person endorsing in blank, as the defendant did, authorizes any person holding the paper for value to insert any amount, and also to affix such stamps as the law requires to be affixed to make the note a good and valid note, within the provisions of the Stamp Acts.

The authority conferred must, however, as it appears to me, when the person filling in the amount is the person suing upon the note so made, be construed to be restricted by the condition that the authority conferred upon such person shall be exercised in the *manner* required by law.

Now the 31st Vic. ch. 9, sec. 4, enacts that the duty on a promissory note, &c., shall be paid by affixing thereto adhesive stamps to the amount of such duty, upon which the signature, or part of the signature of the maker, or his initials, or some integral or material part of the instrument shall be written, so as, (as far as may be practicable) to identify each stamp with the instrument to which it is attached, or the person affixing such adhesive stamp shall at the time of affixing the same write or stamp thereon the date at which it is affixed; and if no integral or material part of the instrument, nor any part of the signature of the maker be written thereon, nor any date, or *if the date do not agree with that of the instrument*, such adhesive stamp shall be of no avail; and any person wilfully writing or stamping a false date upon any adhesive stamp shall incur a penalty of \$100 for each such offence.

And the 11th section of the Act, which is the section of that number enacted in 33 Vic. ch. 13, enacts that save only in the case of payment of double duty, as in the 12th section enacted by 37 Vic. ch. 47 is provided, such instrument shall be invalid and of no effect in law or in equity.

Then the 3rd sec. of 37 Vic. ch. 47, enacts that notwith-

standing anything in 31 Vic. ch. 9, or in 33 Vic. ch. 13, or in this 37th Vic. ch. 47, from and after the first day of August, 1874, any bank or broker, which word bank the Act defines to mean, any chartered bank, and any banking institution, and any branch or agency thereof, "who makes, draws, or issues, or negotiates, presents for payment or pays, or takes, or receives, or becomes the holder of any instrument," &c., "knowing the same not to be duly stamped, and who does not immediately upon making, issuing, negotiating," &c., "taking, or receiving, or becoming the holder of such instrument, affix thereto and cancel the proper stamps within the meaning of the Act 31 Vic. ch. 9, shall incur a penalty of \$500 for every such offence; and shall not be entitled to recover on such instrument, or to make the same available for any purpose whatever, and any such instrument shall be invalid and of no effect in law or equity."

This section appears to me to be plainly designed to except banks and brokers from the *benefit* conferred by sections 11 and 12 upon other holders into whose hands instruments may come unstamped or improperly stamped. Bankers and brokers must comply with this third section of 37 Vic. ch. 47, or in default they shall not only be unable to recover thereon, or to pass the instrument for value to any one else who shall be able to give it validity, but such instrument shall be invalid and of no effect in law or equity, and shall not therefore be capable of being again reinstated by any one under the provisions of section 12.

The effect of section 4 of 31 Vic. ch. 9, is in substance to direct that every note shall be stamped, and that the stamps shall be cancelled upon the day of the date of the note—that is the only day upon which the provisions of the statute for stamping with single duty can effectually be complied with. If not done then it is utterly void, save in the hands of persons coming within the protection of section 12, and save, in the case of banks, when they become holders for value and shall comply immediately with section 3 of 37 Vic. ch. 47.

The effect then of this note having been dated at the time the defendant indorsed it seems to me to be that thereby, subject to the provisions of section 12, the authority given by the defendant, implied from his indorsing in blank, to perfect the piece of paper as a note, was qualified and restricted by the condition that this should be done upon the day of the date, when alone it could be properly stamped, and so as not to subject the defendant to the penalties of the statute. It was as if the defendant said when indorsing, I hereby give authority to any one into whose hands this piece of paper shall lawfully come, to insert any amount therein, provided it shall be done to-day, but I do not give authority to any one to issue it at a time when the doing so will of necessity subject me to the penalties attached to a violation of the Stamp Act.

These observations are, of course, to be taken as confined to cases like the present, where the party claiming the right to insert the amount in the piece of paper, and to impress upon it the character of a note in virtue of the authority proceeding from the defendant to be implied from his endorsing in blank, is the person who is suing upon the note as direct endorsee. They would not, of course, apply to the case of a *bonâ fide* holder for value within the twelfth section, who was not the person who inserted the amount in the note, and affected it with the infirmity which is complained of here.

We find then as matter of fact, that Benoit, the bank officer, whose acts must be regarded as the acts of the plaintiffs, included the price of the stamps which are upon the note in the amount inserted in the note. Now this fact, coupled with the fact that the plaintiffs, from the 9th September to the 21st October, could have had possession of the blank piece of paper in no other character than as agents of the parties whose names were upon it, seems to lead to the conclusion that we must regard the plaintiffs, when affixing the stamps which are upon the note, as assuming to act in the character of such agents, and not as being then themselves the holders of the perfected note

for value. If the amount had been put on by them in the character of holders, after they had acquired property in the perfected note, the amount would not have been included in the amount for which the note was given.

If then these stamps are to be considered, as I think they must be, as having been affixed by the plaintiffs in the character of and assuming to act as agents of the parties whose names were on the paper, then the plaintiffs are placed in this dilemma, that they have never yet affixed and cancelled any stamps within the provisions of the 3rd sec. of 37 Vic., ch. 47; and if they can be regarded as having been affixed by them in the character of holders immediately upon their receiving the note, as if they then for the first time discovered the defect that the note had no stamps, then the stamps do not appear to have been cancelled in the precise manner required by the Act, that is to say, by the 12th sec. enacted by 37 Vic. ch. 47, which, since the passing of that Act, must be read as if it had been the original 12th sec. of 31 Vic. ch. 9.

Then, again, the 3rd sec. of 37 Vic. ch. 47, required the plaintiffs to affix to this note and to cancel the proper stamps upon pain, in default, of the note being utterly unavailable to them and utterly null and void. This provision involved the necessity of cancelling in the manner required by law.

Now, under the circumstances of this case, what were the proper stamps and how were they to be cancelled? Until the amount was inserted, there were no stamps required to be affixed. It was the amount inserted in the note which determined the amount of stamps required by law at the creation of the note. The plaintiffs inserted the amount (for what their servant Benoit did must be regarded as done by them), they thereby determined the *amount* of stamps necessary. In the sense of determining the *amount* of stamps necessary, the note was then made, and single duty stamps are what the law requires to be affixed at the time of the note coming into existence. But it is not in the *amount* affixed that there is any defect; stamps to a

sufficient *amount* were affixed by the plaintiffs when they first impressed upon the piece of blank paper the character of a note. It is in the mode of cancelling that the defect is, and that defect is of such a nature that, no matter what the *amount* of stamps put on, it could not upon the 21st of October, or ever thereafter, have been remedied, the note bearing date upon the 9th of September.

It is apparent, I think, that the Legislature have ignored wholly the existence of antedated promissory notes in the provision they have made for stamping those instruments.

Now the plaintiffs having, as agents of the parties whose names were on the paper, retained it in its imperfect state in their hands until the 21st of October, when they first impressed upon it the character of a note, they must be regarded as then issuing it, and knowingly and wilfully attempting to give it negotiability, and to issue it as a note under such circumstances that they could not in the character of agents of the parties whose names were on the paper give it validity at all; and I must say that I can see nothing in the statute which would warrant us in coming to the conclusion that the plaintiffs, who gave existence to this note, and issued and put it forth as a negotiable instrument under circumstances prohibited by law, can, at the same instant, claim the privilege of reinstating in their own interest, as if holders for value, an instrument which their own act impressed at its creation with an infirmity which the statute declares invalidated it.

If it be said that the plaintiffs have a right to regard the note as having been actually made complete and endorsed, as appearing on its face, upon the 9th September, and that they had a right to reinstate it upon becoming the holders of it, they appear then to be placed in this dilemma, that being in possession from the 9th September of a note not duly stamped according to law, they, in violation of the express provisions of the 3rd sec. of 37 Vic. ch. 47, abstained from affixing any stamps and cancelling them until the 21st October, assuming what they did then in other respects sufficient, and so have made the note wholly unavailable to themselves.

I confess I do not think that the commercial community will suffer much by its being held that paper having a date affixed to it when signed in blank by the parties thereto, and subsequently impressed with the complete character of a note in the precise manner in which this note was, can never be made valid in the hands of the banking institution whose act has caused the defect relied upon here.

When a person who endorses paper in blank to be transferred to a banking institution as security or otherwise, takes the precaution to give the paper a date at the time of his endorsing, he may reasonably expect that he has provided for himself some protection against the bank retaining it in their hands for an indefinite period not perfected as a note, and some guarantee that they shall take care that it be perfected within the meaning of the provisions of the Stamp Act upon the day of the date of the paper, and that it shall not be issued and made negotiable by the bank at a time and in a manner so as to subject the endorser to the penalties attached to a violation of the statute.

Upon the whole, I am of opinion, for the several reasons I have given, that the plaintiffs are the persons responsible for this note having been issued without being properly stamped; and that the provisions of the Stamp Act are such that they, being the persons who, upon the 21st of October, impressed upon this note, dated and endorsed upon the 9th of September, the character of a note, and issued it to themselves as a negotiable security, cannot recover upon it against the defendant; and that in their hands it is wholly unavailable, and is invalid both at law and in equity, in the words of the statute.

GALT, J., concurred.

*Rule absolute.*

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## THE CANADA COMPANY V. DOUGLAS.

*Statute of limitations—Possession—Entry by owner.*

In February, 1853, after the expiration of a lease by the plaintiffs to R. for ten years, R. continued in possession; and in 1854 defendant, who had married R.'s daughter, came to reside with R., under a verbal agreement, as he asserted, whereby R. handed over the possession to him; but the evidence shewed that R. and his wife still remained on the place until his death in 1860. After R.'s death his widow and defendant continued to reside on the premises; but the defendant was frequently absent working for others. In 1862, while defendant was so absent, and the widow alone in actual visible possession, S., the plaintiff's agent, entered, and the widow signed a written instrument, witnessed by S., confessing that she was on the land merely on sufferance of the plaintiffs, and undertaking to give them possession whenever they might require it. Afterwards defendant returned to the premises; and in 1866 the plaintiffs brought ejectment.

*Held*, that the plaintiffs' entry and the acknowledgment signed by the widow in 1862 put an end to defendant's former possession, if any, so that the Statute of Limitations would run only from that period; and that they therefore were not barred.

This was an action of ejectment to recover possession of the east half of lot No. 30, in the 9th concession of the township of Marlborough.

The plaintiffs claimed by grant from the Crown.

The defendant, besides denying the plaintiff's title, claimed by length of possession.

The cause was tried before Moss, J., without a jury, at Ottawa, at the Fall Assizes of 1876, when a verdict was rendered for the defendant.

The evidence, so far as material, is set out in the judgment.

In this term, February 8th, 1877, *Robinson*, Q. C., obtained a rule *nisi* under the Law Reform Act, to set aside the verdict for the defendant, and to enter a verdict for the plaintiffs.

During the same term, February 16th, 1877, *J. W. W. Ward* (Ottawa) shewed cause. The rule is defective in not setting out the grounds, which should be specifically stated: *McDermott v. Ireson*, 38 U. C. R. 1. Then as to possession. The plaintiffs are barred having been out of posses-

sion for twenty years: *Kipp v. Incorporated Synod of Toronto*, 33 U. C. R. 220. When defendant went to reside on the property, Rogers, who was then in possession, made over the possession to him, and defendant has continued in possession ever since. Rogers had the right to transfer the possession to the defendant: *McNish v. Munro*, 25 C. P. 290; *Asher v. Whitlock*, L. R. 1 Q. B. 1. The defendant, therefore, was the only person who could give an acknowledgment so as to stop the running of the statute. The acknowledgment by the widow cannot defeat the defendant's right. The plaintiffs by bringing the action against defendant, admit that he was the person in possession. The defendant's possession was of the whole lot. The lease was of the whole lot, and on its termination the possession continued the same: *Evans's Statutes*, 3rd ed., vol. ix, p. 452; *Butler v. Church*, 16 Grant 205, 18 Grant 190; *Truesdell v. Cook*, 18 Grant 532; *Davis v. Henderson*, 29 U. C. R. 345; *Hyland v. Scott*, 19 C. P. 165; *Butterfield v. Maybee*, 22 C. P. 230; *Mulholland v. Conklin*, 22 C. P. 372; *Cahuac v. Scott*, 22 C. P. 551; *Dundas v. Johnston*, 24 U. C. R. 547.

*Robinson, Q. C.* There is nothing in the objection as to the rule. It is sufficient and has been the practice to state only, as here, that it is under the Law Reform Act, and that opens up all the objections taken at the trial. As to possession. The proper inference from the evidence is, that the possession was that of Rogers, and not of the defendant, who was merely residing with him. To create a bar under the statute, not only must the owner be out of possession, but there must be an adverse possession in another: *Lloyd v. Henderson*, 25 C. P. 258. Assuming that defendant was in possession, his possession was that only of a wrong doer; and an entry by the plaintiff during his absence put an end to the possession, and created a new starting point for the statute. This was the effect of Strickland's entry, which was done with the intention of taking possession and while defendant happened to be absent. The widow by giving the acknowledgment prevented her removal and

the taking of actual possession by the plaintiffs: *Williams v. McDonald*, 33 U. C. R. 423; *Clements v. Martin*, 21 C. P. 512; *Doe dem. Shepherd v. Bayley*, 10 U. C. R. 319; *Holmes v. Holmes*, 17 Grant 610. At all events the possession, whether of Rogers or of the defendant, would only be of the thirty-five acres, which there was actual possession of. There is a wide distinction between a person in possession under a claim of right or colour of right, and a mere wrongdoer, as here, or a squatter. In the former case the possession may be held to cover the whole lot, while in the latter it is limited to the pedal possession. There is no evidence here of any acts of ownership over the residue of the lot. No doubt Rogers, during the continuance of the lease, was in possession of the whole lot, but the moment the lease terminated and he continued in possession, as a mere wrongdoer, his possession would be confined to his actual possession: *McKinnon v. McDonald*, 13 Grant 152; *McMaster v. Morrison*, 14 Grant 138; *Dundas v. Johnston*, 24 U. C. R. 547; *Heyland v. Scott*, 19 C. P. 165; *Davis v. Henderson*, 29 U. C. R. 345; *Mulholland v. Conklin*, 22 C. P. 372.

March 9th, 1877. GWYNNE, J.—There appear to me to be some circumstances in this case which have been overlooked by the learned Judge who tried the case, and who rendered a verdict for the defendant, which circumstances being properly considered, there does not appear to be much difficulty in the case.

On the 30th of June, 1843, the plaintiffs executed an indenture of demise of the lot in question to one Henry Rogers, who was then in possession of the lot as a squatter, for the term of ten years, computed from the 1st of February, 1843, and Rogers accepted of this lease. Rogers, with his wife and family, continued in occupation of the lot under the lease until its termination by efflux of time upon the 1st of February, 1853. In 1851, one of Rogers's daughters married the defendant. From the 1st of February, 1853, Rogers paid no rent whatever, and his possession

was thenceforth wholly at the sufferance of the plaintiffs, and he might have been evicted by them at any moment without any notice whatever. In 1854 Rogers's family consisted of his wife, a son, and two or three daughters, unmarried, so far as appears. In this year the defendant, as he himself says, came at the request of Rogers to live with him, bringing with him his wife, Rogers's daughter. Rogers's son continued to live with his father for some time, until, when does not clearly appear, he removed up the country, working for himself, and died, but when does not appear either. The unmarried daughters also, as the defendant himself testifies, left home shortly after the defendant went to live with Rogers, but they used to come on visits to their parents. As the defendant says, "*They came naturally as to their father's house.*" Rogers died upon the premises on the 27th of December, 1860.

The learned Judge was of opinion, as a matter of fact, that the defendant, from the time of his going to live with his father-in-law, was, in pursuance of some verbal arrangement made between them, the person who was in fact in possession of the premises.

I confess I can see nothing in the evidence which would justify the conclusion that the defendant had any exclusive possession during Rogers's life time. It seems to me to be sufficiently clear from the defendant's own evidence that Rogers was in possession until his death in December, 1860.

The defendant it is true says, that *he, i. e.* the defendant, paid the taxes during the years 1857-58-59-60-61; but the plaintiffs produce the receipt of the treasurer of the county for payment of the taxes by them during those years; while the defendant, in support of his assertion, neither produces any receipt nor the evidence of any collector, nor does he shew that the land was assessed during those years as occupied lands. However, whether he did or not pay taxes in those years, or whether he was in fact the person having the actual possession when Rogers died, or afterwards, does not appear to me of much moment, for his possession, during whatever period he had possession,

was no other than that of a tortfeasor against the plaintiffs, the rightful owners.

Rogers, who in 1854 was himself in possession only on the sufferance of the plaintiffs, could not give to defendant the position of tenant at will or otherwise to the plaintiffs, and consequently the defendant, never having had any possession as tenant at will or otherwise by permission of the plaintiffs, could not as against the plaintiffs, the true owners, assert possession to be in himself, unless he was, either personally or by some person holding possession for him, in actual visible possession. A person having title has the possession in law and in fact, although neither by himself nor another in actual visible possession; but if a wrongdoer be out of actual possession for any length of time, however short, and during such absence the true owner enters upon the land, *he* becomes, as I apprehend, beyond all doubt, reinstated in the possession of his former estate, and the time running under the Statute of Limitations becomes interrupted. This becomes important, because it appears that the defendant's mode of living chiefly, both before and since Rogers's death, was to go about the country digging wells and putting down pumps, and while absent, it may be upon one of these excursions, the plaintiffs in 1862, as the evidence adduced by the defendant proved, entered upon the premises.

Mr. Strickland, a witness called by the defendant, proves most unequivocally that in the month of October, 1862, before the expiration of twenty years from the 1st of February, 1853, when the plaintiffs' right of entry accrued, he, by the authority of the plaintiffs, entered upon the premises *animo possidendi* upon their behalf, and upon their behalf resumed possession. At this time the defendant was not upon the premises. He had no actual and visible possession thereof. The only person in actual and visible possession was Ann Rogers, the widow of Henry Rogers, the former tenant of the plaintiffs.

Now the defendant, having no title to possession and being actually absent, can not, being absent, assert against

the true owners that the possession, whatever it was, which the defendant had before the entry, continued unbroken, notwithstanding the entry.

In short, when the plaintiffs so re-entered, Ann Rogers was the sole person in possession, on her own behoof or as servant of the defendant. It matters not which, for the plaintiffs' re-entry, for however short a time, reinstated them in their former title; and their agent could then have evicted from the possession the only person who was then in possession, and in law he did, for to prevent bodily removal she attorned to the plaintiffs by an instrument which was witnessed by this gentleman, whom the defendant himself calls, and which is in these words: "I, the undersigned, at present occupying lot E.  $\frac{1}{2}$  30 in the 9th concession of Marlborough, hereby confess that I am on the land merely on sufferance of the Canada Company, and I hereby undertake to give possession of the same at any time when required to do so either by the Canada Company or their assigns."

The signing of this document by Ann Rogers, under these circumstances, operated precisely to the same extent as if she had been removed, or as if, there being no person in actual possession, another person had been placed in actual possession by the plaintiff as their tenant or bailiff. When then the defendant afterwards came back to the premises, he did so as a tortfeasor. He was entering upon the possession of the plaintiffs, held by them through their tenant Ann Rogers. The defendant's former possession, if he had any, was broken, and this new entry by the defendant gave the plaintiffs the right of entry which is the foundation of this action. The right of entry which first accrued in February, 1853, was, as it seems to me, fully and effectually exercised by the entry proved by the defendant's witness, Strickland, in 1862, and what took place upon that occasion was a complete reinstatement of the plaintiffs in their first estate. Had the defendant never again returned to the premises, no action of ejectment against him would have been necessary, the plaintiffs being

as much in possession as if they had been put in possession by the sheriff upon a writ of possession. This return, therefore, is what constitutes his entry from which his possession as against the plaintiffs must in this action be counted.

*Clements v. Martin*, 21 C. P. 512, and *Randall v. Stevens*, 2 E. & B. 641, contain the principle which governs this case.

HAGARTY, C. J.—There is no doubt but that when Strickland entered in 1862, the widow of Rogers, the former lessee, was living on the land in the house, and, so far as Strickland knew or could learn, was supposed to be the person in possession of the place.

There is no reason for thinking that Strickland knew of or saw any other person in possession, and I think he dealt in good faith with her as the person in possession. This was very natural, knowing her to be the widow of the deceased lessee—the only person known to the true owners.

I cannot see how the legal effect of this entry by the owners can be affected or prejudiced by the proof of any existing parol or other agreement between the old lessee and this defendant, or any other person, as to the management or control of the place. There is no suggestion of any collusion or bad faith on the part of Strickland or the widow.

She was the only person that Strickland found on the place, and in apparent possession; and when he took the written admission of title from this person, and that person remained as before on the place down to the trial, it certainly seems to me that the defence under the Statute of Limitations must fail.

I hardly see what more an owner of land, desiring to make an entry in assertion of a right, and to obtain an admission or attornment, could be reasonably expected to do.

The legal effect thereof can hardly, I think, be made to depend either on the amount of diligence used by the

owner in ascertaining the exact position of the members of this family each to the other, or in the existence or non-existence of any agreement as to the working or management of the farm.

If the true owner, designing to enter and assert his right, takes a person with him who gives an admission like that here, and then is allowed without interruption to remain on the land for years in any capacity, can it be said that the statute can begin to run until at all events a year after such entry and admission of title?

I think not; and that in the present case the statute has, at the worst, only run against the true owner since 1863.

In *Randall v. Stephens*, 2 E. & B. 641, Lord Campbell, at p. 652, cites the words of the Act: "No person shall be deemed to be in possession of any land within the meaning of this Act, *merely* by reason of having made an entry thereon." "But this," he says, "evidently applies to a *mere entry*, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time and pronouncing a few words, without any attempt or intention or wish to take possession. In the present case, possession was actually taken by the overseers *animo possidendi*: and whether possession was retained by them an hour or a week must, for this purpose be immaterial. They were lawfully in of their fee simple title."

In that case, after about twenty years' possession, the overseers, who had originally put defendant in possession, went to the place to prevent title being acquired under the statute. They turned the defendant and his family out, and removed nearly the whole of the furniture, &c.

Shortly after, on the same day, defendant resumed possession. This was the entry Lord Campbell speaks of.

Had Strickland in this case gone to the premises, made the widow and those he found there go out, and had he removed furniture, &c., his entry would have been clearly sufficient, although the present defendant came back to the place two hours later and took possession.

The effect of such an entry could not, I think, in the least depend on the presence or absence of the defendant, or of any agreement as to possession or management between him and any one else.

I think the plaintiffs did all that the law required to constitute a good entry *animo possidendi* and assertion of title.

The rule will therefore be absolute to enter a verdict for the plaintiffs.

GALT, J., concurred.

*Rule absolute.*

## DYELL V. MILLAGE.

### SPECIAL CASE.

*Township of Emily—Side lines—36 Vic. ch. 60, O.*

By 36 Vic. ch. 60, sec. 1, O.,—after reciting that great inconvenience had resulted from the concessions in the township of Emily having been intended to be made double-fronted, but posts not having been in many cases planted at the front and rear angles of the lots—it is enacted that notwithstanding anything in secs. 28-31, inclusive, of C. S. U. C. ch. 93: 1. Where posts were in the original survey planted at the front, but not at the rear angles of any lot, the side lines should be run from the posts at the front angles to the rear of the concession, parallel with the governing line. 2. Where posts were in the original survey planted at the rear angles of any lot, the side lines should be run from the front angles of such lot parallel with the governing line to the centre of the concession, and thence direct to the post at the rear angle. 3. In all other cases, the side lines should be run from the front angles of the lots to the rear of the concession, parallel to the governing line. In trespass, to try the boundary between lots 15 and 16 in the 14th concession, it was admitted that the original survey of the township was intended to be in double-fronted concessions, and that there was satisfactory evidence of the original posts at the north or rear end of the concession, between lots 14 and 15 and lots 17 and 18, but not of the intermediate posts. It was admitted also that a post had been planted in the rear, in the original survey between the two lots in question; and the post in front was agreed upon.

*Held*, that the case came within the third sub-section, and that the line must therefore be drawn from the front to the rear of the concession parallel with the governing line.

THIS was an action of trespass *quare clausum fregit*, to a piece or parcel of land in the 14th concession of the Township of Emily, in the County of Victoria, described as follows, that is to say: commencing on the northern boundary of the said Township of Emily, at a distance of 78 chains and 90 links, and two-thirds of a link, easterly from the northwest corner of lot No. 15, in the said 14th concession: thence south,  $11^{\circ} 29'$  and  $44''$  east astronomically, 35 chains and 34 links, more or less, to the centre of the said concession: thence north,  $18^{\circ} 28'$  west astronomically, 34 chains and 97 and one half links, more or less, to the northern boundary of the said township: thence easterly, along the said northern boundary, 4 chains,  $32\frac{1}{2}$  links, more or less, to the place of beginning, containing by admeasurement, 7 acres, 2 roods and 10 perches more or less; and which piece or parcel of land is claimed by the plaintiff as part of lot No. 15 in the said 14th concession of the Township of Emily. And by the consent of the parties, and by order of Mr. Dalton, dated the 11th day of November, A. D., 1876, according to the Common Law Procedure Act, the following case was stated for the opinion of the Court without any pleadings:

1. The plaintiff and the defendant are respectively the owners of lots No. 15 and 16 in the 14th concession of the Township of Emily, in the County of Victoria, the concessions of the said township numbering from the south, and the 14th being the last or most northerly concession of the township.

2. The concessions of the said township were in the original survey thereof laid out as, and intended to be, double-fronted concessions.

3. Satisfactory evidence of the positions of the original posts of such survey at the north end of the 14th concession, (being the northern boundary of the township,) and as marking the division between lots 14 and 15, and between lots 17 and 18 has been produced, but no evidence of the position of any of the intermediate posts can be obtained, but the limits of the intermediate lots on such northern end of the concession have been ascertained and determined under and in accordance with the provisions of section 33 of Consol. Stat. U. C. ch. 93.

4. The north end of said concession, being the northern boundary of said township, was actually run in the original survey, and all the lots of the 14th concession thereon laid out in accordance with the instructions to the Crown surveyor, which required him to plant posts or monuments at and as marking the rear angle of all the lots in the said 14th concession, as appears by the copy of the field-notes of such original survey that is hereto attached, marked "A," and admitted to be a true copy, and which is made a part of this case.

5. The plan hereto attached, and marked "B," is also made a part of this case.

6. At the south end of the said 14th concession, the positions of the original posts have been established between lots 17 and 18. and between lot 13 and the side line to the west of it, but the positions of the intermediate posts cannot be ascertained.

7. The division between the said lots 15 and 16, at the south end of the concession, is agreed to as laid out on said plan, the same having been established under the provisions of section 33 of Consol. Stat. U. C. ch. 93.

8. The division line between lots 15 and 16, from the south end to the centre of said concession, being a line run from the intersection of the said lots at the south end of the concession, as ascertained under the said section 33, and thence northerly parallel with the governing line to the centre of the concession, is agreed to.

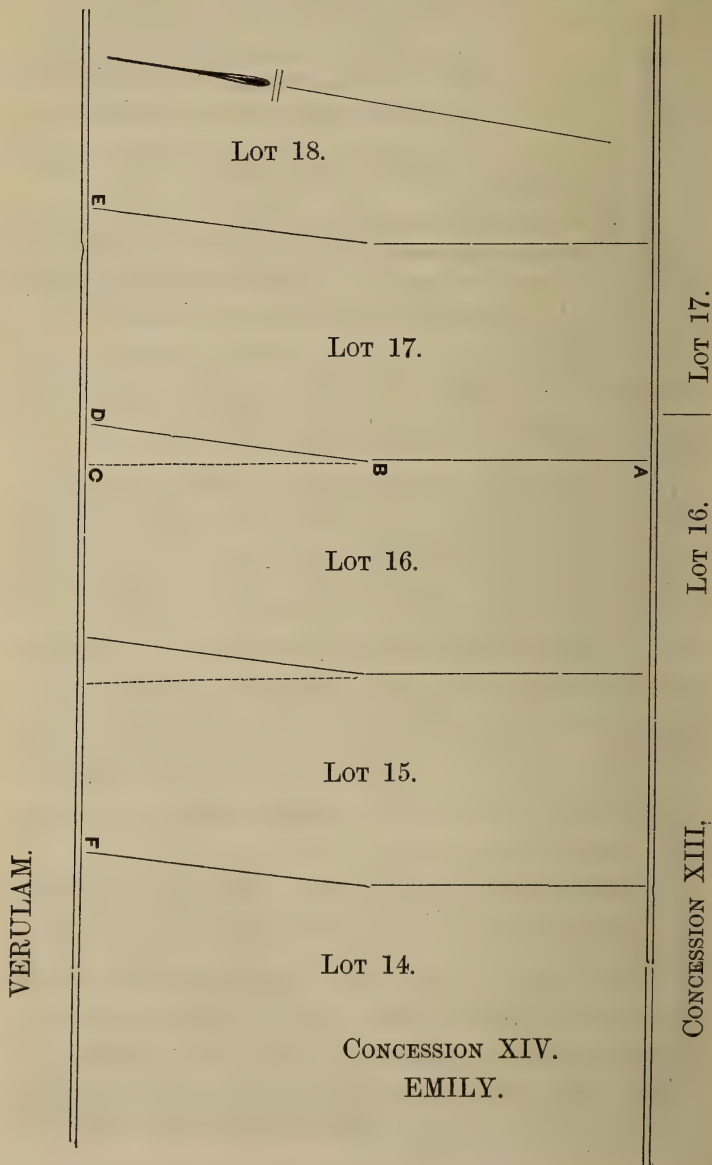
The question for the opinion of the Court is: Whether the division line between lots 15 and 16 should be run from the front of the concession at the intersection of the said lots 15 and 16, so ascertained and agreed upon, northward to the rear of the concession, parallel with the governing line, which would be the dotted line shewn on the plan. See 36 Vic. ch. 60, O.

Or, should be run from the same starting point northward to the centre of the concession, parallel with the governing line, and thence direct to a point on the northern limit of the concession, ascertained by and under the provisions of section 33 of Consol. Stat. U. C. ch. 93, to be the division between the said lots, or in any other manner.

If the Court should be of opinion in the affirmative, then judgment of *nolle prosequi* shall be entered for the defendant, without costs of defence.

If the Court should be of opinion in the negative, then judgment shall be entered for the plaintiff for the sum of \$1, without costs of suit.

The following is the plan referred to in the above case :



In Michaelmas term, December 6th 1876, the case was argued.

*Watson*, for the plaintiff.

*J. K. Kerr*, Q. C., contra.

The arguments sufficiently appear from the judgment.

February 5th, 1877. GWYNNE, J.—The question submitted to us in this case is—the starting point for commencing the survey hereinafter mentioned being agreed upon—is the survey of the lines between Lots Nos. 15 and 16, in the 14th concession of the Township of Emily, to be drawn from front to rear, parallel with the governing line, under 36 Vic. ch. 60, O., or only parallel with such governing line to the centre of the concession, and thence to such point as (the original post not being forthcoming) would, under the provisions of sec. 33 of ch. 98 of the Consolidated Statutes of Upper Canada, be established as the line between the rear halves of those lots, the concession having been surveyed as a double-front concession.

The question turns upon the construction to be put upon 36 Vic. ch. 60, sec. 1.

That Act recites that great inconvenience has resulted from the concessions of the Township of Emily having been intended to be made double fronted, but that posts had not in many cases been planted at the front and rear angles of the lots, and that the reeve and inhabitants had prayed that the side lines in that township might be drawn and run in the manner provided for by the Act; and it then enacts that, "For and notwithstanding anything to the contrary in the 71st and nine following sections of the Act respecting land surveyors and survey of lands in Upper Canada, or in the 28th and following sections of the Act respecting the survey of lands in Upper Canada, or ch. 93 of the Consolidated Statutes of Upper Canada, or any other Act or law: the side lines between contiguous lots in the Township of Emily shall, (*except as hereinafter mentioned*), be drawn and run in manner following; that is to say:"

Sub-sec. 1. "In all cases where posts were in the original

survey planted at the front angles, but not at the rear angles, of any lot, the side lines of such lot shall be drawn and run from the posts at the front angles to the rear of the concession, parallel with the governing line”;

Sub-sec. 2. “In all cases where posts were in the original survey planted at the rear angles of any lot, the side lines of such lot shall be drawn and run from the front angles of such lot parallel with the governing line to the centre of the concession, and from thence direct *to the post* at the rear angle of such lot”;

Sub-sec. 3. “In all cases not provided for by the preceding sub-sections of this section, the side lines between the lots shall be drawn and run from the front angles of the lots to the rear of the concession parallel to the governing line.”

The special case submitted to us admits, among other things, that the original survey of the township was intended to be in double-front concessions, and that satisfactory evidence of the position of the original posts of such survey at the north end of the 14th concession, being the northerly and rear concession of the township, as marking the division between lots 14 and 15 and between lots 17 and 18 on that concession, has been produced, but that no evidence of any of the intermediate posts can be obtained.

The plaintiff's contention, by his counsel, Mr. Watson, is that, in order to determine where the line between lots 15 and 16 is to be drawn, under 36 Vic. ch. 60, where it strikes the concession line in rear of the township, the space between the ascertained original posts on that rear line is to be divided to determine the original front angle of those double-front lots in the rear under sec. 33 of ch. 93 of the Consolidated Statutes of Upper Canada; and that this line is to be drawn, under 36 Vic. ch. 60, from the front of the lot or south end to the centre of the concession, and from the centre to the point which ch. 93, sec. 33, would have determined to be the angle in front of the rear or double-front, if 36 Vic. ch. 60 had never been passed. He rests his contention upon the fact that this 33rd section is

not one of those mentioned in the 1st section of 36 Vic. ch. 60, the application of which is excluded by that statute when side lines in the township of Emily are to be run.

He contends, also, that the fourth paragraph of the special case must be construed, although the parties differ as to their intention upon this point, as admitting that, in the original survey, posts were planted on the north side of the township, establishing, on that line, the front angles of all the rear halves of the lots in the 14th concession.

That fourth paragraph is as follows: "The north end of the said concession, being the northern boundary of said township, was actually run in the original survey, and all the lots of the 14th concession were laid out in accordance with instructions to the Crown surveyor, which required him to plant posts or monuments at and as marking the rear angles of all the lots in the said 14th concession, as appears by the copy of the field notes of such original survey attached to the case, marked A, and made a part of this case."

Mr. Kerr, for the defendant, on the contrary, contended that the true construction of the fourth paragraph is, that the lots were laid out in the 14th concession in the manner appearing upon the field notes attached, which said nothing whatever of planting a post, although the instructions to the surveyor required him to plant posts, not, as in the fourth paragraph stated, as marking the *rear* angles of the lots, but, as we know, the concession being intended to be surveyed in double fronts, as marking the *front* angles of the rear halves of the lots.

And, 2nd, he contends that, it being admitted by the third paragraph of the case that the place of the posts cannot be determined by anything appearing on the ground, the statute 36 Vic. ch. 60 governs, without reference to the Consol. Stat. ch. 93, sec. 33.

If we should be of opinion that the plaintiff's contention is correct, it is agreed that our judgment should be to enter a verdict for him for \$1 damages, without costs.

- And if we should be of opinion that the defendant's con-

tention should prevail, that then a judgment of *nolle prosequi* shall be entered, without costs.

In my opinion the contention of the defendant, as pressed by Mr. Kerr, is entitled to prevail. The object of the Act appears to me to be to do away with, for the reasons stated in the preamble, the character intended in the original survey, but imperfectly effected, to have been impressed upon the township as a double-front concession township, and to have the side lines run from the front to the rear as in single front concessions, save only that where the posts were on the original survey planted and can be clearly ascertained to be original posts, the lines shall be drawn from the point in the *centre* of the concessions (reached by lines drawn from the *front*) straight to the *posts in the rear*. It was necessary that the 33rd sec. of ch. 93 of the Consolidated Statutes of Upper Canada should remain in full force as regards the *front* or south ends of the concession; for in the case of original posts upon that end of the concession not having been planted between all the lots, or in case of their being lost, leaving no trace of the places where they had been planted, it would be absolutely necessary to have recourse to the 33rd sec. of Consol. Stat. ch. 93, in order to ascertain and determine the *front* angles on the south side. But these angles being determined, the Act 36 Vic. ch. 60, applies the principle of the survey of single front concessions to the township of Emily, except in the case, as I think, where the original posts are found standing, or are known to have stood, in the rear as planted in the original survey defining the front angles of the rear halves, which is now called the rear of the whole lot—not, as in a double-front concession, the front angle of the rear or double front.

The second sub-section of section 1 of 36 Vic. ch. 60, which provides that in all cases where posts were planted on the original survey at the rear angles of any lot, meaning of course, at the front angles of the rear half, the sides of such lot shall be drawn, not *from* such posts, but from the angles at the south or *front* of the con-

cessions to the centre of the concession, parallel with the governing line, and from thence direct *to the post*—not to the place where the 33rd sec. of ch. 93 (the post or its situs not being capable of being found) would determine to be the angle of the lot, in default of the post being forthcoming; but to *the post* as a thing in existence and discernible, or at least as the very known point where the post was in fact planted on the original survey. If the original post, or the place where it was in fact originally planted, if planted, is discernible, it is to govern as the rear angle of the lot, otherwise the line must be drawn from the angles in front parallel with the governing line throughout to the rear.

Whatever may be the true construction to be put upon the fourth paragraph of the special case—namely, whether it is to be taken as an admission that posts were in fact planted upon the original survey designating the angle of lots 15 and 16 in the rear of the concession—I think this is the proper construction to put upon the Act, namely, that to call for the side line to be run between any particular lots otherwise than parallel with the governing line from front to rear, there must be a point discernible as the place where an original post was in fact planted upon the original survey. The third sub-section expressly points to cases other than those named in the first and second sub-sections; the first providing for cases where posts had not been planted at the *rear* angles upon the original survey, and the second to cases where posts had been planted at the rear angles upon such survey. What other cases could there be to which the third sub-section could apply, unless it be to the case where, although the posts may have been planted, their situs cannot be ascertained, which is the case before us, construing the fourth paragraph as an admission of the post between these two lots having been originally planted somewhere. This would be a case not in terms covered by the first or second sub-section, and which therefore should be brought under the third sub-section.

In my opinion, therefore, the line should be run through-

out from the front angle parallel with the governing line, and so, according to the agreement in the special case, judgment of *nolle prosequi* should be entered.

HAGARTY, C. J.—Unless we accept the result arrived at by my brother Gwynne, I see no way of giving effect to the statute 36 Vic. ch. 60. It was intended to remedy an existing evil. It starts with the declaration that posts have not “in many cases,” been planted at the front and rear angles.

I think we must read such language as meaning further, “or having been originally planted cannot now be found or proved.”

When a post cannot either be found, or its former locality satisfactorily proved, the mischief is just the same as if it had never in fact been planted.

If we adopt the plaintiff's view, that, as in ordinary cases, the space between the next ascertained original posts shall be equally apportioned, the Act seems to be of little avail. It was intended, we must assume, to remedy an acknowledged evil, and I am of opinion that it must be read as above.

Where by an original scheme of survey posts ought to have been planted at the rear angles, where all trace or proof is lost we must, I think, assume that they never were in fact planted. The old maxim, as to things not proved and things not existing being in the same category, ought to apply.

Sec. 1. Applies where in the original survey posts were planted at the front but not at the rear angles.

Sec. 2. Where posts were planted at the rear angles.

I agree in holding that this means an actual, not an intended planting of posts.

Then if this case do not fall within section 2, we cannot avoid the conclusion that the side lines must be drawn all through parallel to the governing line.

No doubt difficulties may arise in carrying out this view of the law, and some of them were suggested on the argument.

I feel a difficulty as to the peculiar wording of the fourth paragraph of the special case, but see no solution except that of my brother Gwynne.

GALT, J., concurred.

*Judgment for defendant.*

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DARK V. HEPBURN ET AL.

*Boundary—Double-front concession—Evidence of.*

In *trespass quære clausum fregit*, to try the boundary line between lots 28 and 29 in the 5th concession of Ops, the plaintiff described in his declaration by metes and bounds the piece of land trespassed upon, alleging it to be part of 28, to which lot his title was not disputed:—*Held*, that “not guilty” was the only plea required, and that the other pleas pleaded and set out below were unnecessary and inappropriate.

The land in question was situated at the rear of the concession (the concessions running north and south and numbering from the west), and plaintiff, claiming that it was a double-front concession, had the division line run from a point on the concession line in the rear, or, what he claimed to be the east front, of the concession; but there was no proper evidence of the concession having, in the original survey, been laid out as a double front concession, and of posts being planted in the rear, while the lots were granted by the letters patent as whole, and not as half, lots.

*Held*, the fact of 28 and 29 having been granted as whole lots, was *primâ facie* evidence of the concessions being single-fronted, and that the grant of half-lots in the adjoining concession could not affect it.

*Held* also, that the fact of defendants attempting to prove a post in rear, from which they contended the line should be run, did not estop them from asserting that the concession was single-fronted.

The jury were asked to find:—1. Is the point contended for by the defendants the place where the original post stood? 2. Did the plaintiff, when he moved his fence, do so on the understanding with defendants that they acknowledged his right, or, was his possession to be subject to the correct adjustment of the line? They found, that the post had not been proved, and that the plaintiff was given possession by the defendants:—*Held*, that on the first answer the verdict should have been for defendants, for the fact that defendants had not proved the post did not relieve plaintiff from proving the true line; and that the second question was not presented by the case.

DECLARATION: For that the defendants broke and entered certain lands of the plaintiff, being part of lot 28 in the

5th concession of the township of Ops, better known and described as follows: Commencing at the north-east angle of the said lot; thence south,  $78^{\circ}$  west, 26 chains 44 links; thence south,  $13^{\circ}$  east, 1 chain; thence north,  $79^{\circ}$  east, along the old fence, 26 chains 44 links, more or less, to the eastern limit of the said lot; thence north,  $13^{\circ}$  west, 1 chain 48 links, more or less, to the place of beginning.

The piece of land here described was a part of the lot 28 in the 5th concession, and that part of it only which extended for the distance of one chain south of a line drawn from the north-east angle of the lot 28 for a distance of 26 chains and 44 links, on a course south,  $78^{\circ}$  west.

The plaintiff did not complain of any trespass upon any other piece of land; a trespass, charged to have been committed upon that particular piece of land, was all that the defendants were called upon to answer.

To this declaration the defendants pleaded:—

1. Not guilty.
2. That the said land was not the plaintiff's, as alleged.
3. The defendant Frances M. Hepburn, wife of the defendant Peter Hepburn, says, that at the time the said alleged trespass was committed, the said piece of land was the freehold of the defendant, Frances M. Hepburn.
4. The defendants Peter and Charles Hepburn alleged precisely the same matter as in the third plea, and further added that they, as the servants of and by command of the said Frances M. Hepburn, broke and entered the said close and committed the said alleged trespass.

The cause was tried before Patterson, J. A., and a jury, at Lindsay, at the Fall Assizes of 1876.

It appeared that the defendant Frances M. Hepburn, being seised in fee of lots 28 and 29 in the 5th concession of Ops, mortgaged lot 28 to the Trust and Loan Company, who, under a power of sale contained in that mortgage, default being made, sold lot 28 to the plaintiff.

There was no dispute at all as to the plaintiff's title to that lot. The real and in fact the only question in dispute

was the site of the boundary line between lots 28 and 29, and whether the piece of land upon which the alleged entry was made was in fact, as it was described in the plaintiff's declaration to be, part of the said lot 28. This depended upon the single point, namely, whether or not the north-east angle of lot 28 was where the plaintiff claimed it to be upon the ground.

There was no dispute as to the course to be run from that point when once established on the ground.

The evidence, so far as material, is set out in the judgment.

The learned Judge entered a verdict for the plaintiff.

In Michaelmas term, November 22nd, 1876, *Armour*, Q. C., obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendants.

In this term, December 6th, 1876, *Hector Cameron*, Q. C., shewed cause. The titles to the respective lots was not disputed, and the only question, therefore, was, as to the piece described in the declaration. The jury found that the post contended for by the defendants was not proved; but they also found that the plaintiff was in peaceable possession, under the agreement with defendant to move the line of the fence, and that the agreement was not to be temporary. *Bernard v. Gibson*, 21 Grant 195, and cases there collected, shews that the effect of such an agreement is, to vest the land in the plaintiff. The fact of the concession being a double-front concession cannot now be questioned, as the whole case was based on its being such a concession. The defendants did not attempt to deny that it was such, but, admitting that it was, their whole evidence was directed to prove the position of the post in such rear front. The mere fact of the lots being granted as whole, and not as half lots, cannot of itself shew that it was a single-front concession.

*Armour*, Q. C., contra. The onus was on the plaintiff to prove the true line, and that the land in question formed

part of lot 28. There is no evidence of where the true line was. There was nothing to shew that the concession was a double-front concession, and the mere fact of the lots being granted as single lots is *prima facie* evidence, in the absence of any evidence to the contrary, that it was a single-front concession, and this gave the land to the defendants. At all events, it rested upon the plaintiff to shew, that according to the survey as a single-front concession, the land would be plaintiff's; but even if a double-front concession, according to the defendants' evidence, the post between lots 28 and 29 was proved so as to give the land to the defendant, Mrs. Hepburn. There was no evidence of any agreement on the part of the wife to the fence being moved; but she objected to its being removed. The husband could not by any consent do away with the wife's land: *Brown v. Dawson*, 12 Ad. & E. 624; *Dicey on Actions*, 333, 340; *Warnock v. Cowan*, 13 U. C. R. 257; *Holmes v. McKechin*, 23 U. C. R. 52, 321; *Marrs v. Davidson*, 26 U. C. R. 641; *Harvey v. Brydges*, 14 M. & W. 437; *Davidson v. Wilson*, 11 Q. B. 890.

February 5th, 1877. GWYNNE, J., delivered the judgment of the Court.

The pleas, excepting the general issue, were wholly inappropriate in view of the single point which was really in contest.

The plaintiff, as it was necessary for him to do, specified by the name and abutments the piece of land for entry upon which he was complaining, describing it to be a part of lot 28.

The plea of not guilty covered the whole point in issue, and operated as a denial that the defendants committed the alleged trespass on the place mentioned. The plea raised no question as to the plaintiff's possession, which, *quoad* that issue, was admitted.

As it appeared at the trial that there never was any question as to the right of the plaintiff to or as to his actual possession of the whole of lot 28, the second plea was quite unnecessary: *Jones v. Chapman*, 2 Ex. 803;

*Manary v. Dash*, 23 U. C. R. 580, and B. & L. Prec., 3rd ed., 444, 801, note.

The other pleas were equally unnecessary and inappropriate. The third is no more than an allegation that the piece of lot 28 described in the declaration was the soil and freehold of the defendant Frances M. Hepburn. No such title was ever in fact asserted, or intended to be set up.

The fourth plea is to the like effect.

These pleas admitted the plaintiff's possession of the particular part of lot 28 described in the declaration, and the defendants at the trial admitted his possession of the whole of that lot, but the pleas denied his right of possession to the piece described, averring the freehold to be in the defendant Frances M. Hepburn, in whose right and as whose servants the other defendants justified: *Cocker v. Crompton*, 1 B. & C. 489; *Harvey v. Brydges*, 14 M. & W. 437.

If the defendants had averred that the piece of land whereon the trespass was committed was part of lot 29, which appears to be the adjoining lot lying north of lot 28, and of the line drawn, as in the declaration mentioned, from the north-east angle of lot 28, and that *it* was the soil and freehold of the defendant Frances, &c., that would have been no more than a plea of not guilty; for if the piece of land, upon which the entry had been made by the defendants had been part of lot No. 29, it could not have been the piece described in the declaration, and in that case it would have been wholly irrelevant whether or not lot 29, or any part of it, was the freehold of any of the defendants: *Manary v. Dash*, 23 U. C. R. 580.

The whole question really in dispute, namely, the true situs upon the ground of the boundary line between the lots 28 and 29, arose upon the plea of not guilty; and the onus lay upon the plaintiff to prove the allegation contained in his declaration, namely, that the defendants had entered upon that part of his lot 28 lying immediately south of and contiguous to the line described as drawn from the north-east angle of the lot; and as his title to and

possession of the whole of that lot never was in fact disputed by the defendants, all the other pleas were irrelevant and inappropriate.

The case was opened at the trial by an admission of the plaintiff's title to lot 28, and that the point in issue was the situs of the boundary line between the lots 28 and 29. Accordingly, the plaintiff, in order to establish the issue joined by him upon the plea of not guilty, gave evidence of the entry of which he complained. This evidence, so far as I can perceive, did not affect the married woman, even if it should appear that the piece of land entered upon by Peter Hepburn and his son Charles was part of lot 28. I am unable to understand, therefore, why she should have been made a defendant at all, as I am equally unable to understand why a plea should have been pleaded by her, or by any of the defendants, asserting that the piece of land described in the declaration, which undoubtedly is part of 28, is her soil and freehold.

The plaintiff then, in order to prove that the place where it appeared that the defendants Peter and Charles had entered was, as he alleged in the declaration, part of lot 28, called one Dean, a provincial land surveyor, to establish upon the ground the situs of the point described in the declaration as the north-east angle of the lot.

His evidence is shortly to the effect that in 1852 he made a survey for one James Duncan, a brother-in-law of the defendant Peter Hepburn, for the purpose of ascertaining how much dry land there was in lot 29, in the 6th concession of the township. This was the last lot in the township, and was, as he learned, a short lot containing only 118 acres. What he did upon that occasion, as he says, was to measure roughly how far lot 29 would run, allowing 118 acres for the lot, 28 being, as he understood, a full lot, and he put down a post to designate the line between 28 and 29, so ascertained. This post, as I understand, was planted in the 6th concession, and on the front of that concession.

A survey so conducted could of course throw no light upon an enquiry as to the true situs of the lines between these lots, either in the 5th or in the 6th concession.

He then says, that in 1872 he ran the line between lots 26 and 27 in the 6th concession for one Bateson, and he says that upon that occasion he had to run up the line between the 5th and 6th concessions (the rear of the 5th and the front of the 6th concession), and to explain his applying what he did then to determining the line between lots 28 and 29 in the 5th concession, the point in question here, he says that these concessions were originally surveyed in double-front concessions.

I see no sufficient evidence that they were so surveyed, and the letters patent for lots 28 and 29 were produced, issued in 1850, granting these lots as whole lots to Mrs. Hepburn and her sister, Charlotte Catherine Hughes.

What the witness Dean says he did, when running the line between lots 26 and 27 in the 6th concession in 1872, was, that he started from the line between lots 23 and 24 in the 6th concession, where there was a post, which he says he had known for twenty years, and he chained from thence up the concession line in front of the 6th concession to the northern boundary of the township, north of lot No. 29, where there was, as he says, an undoubted stone monument, and he divided the space.

If the post spoken of as being then between lots 23 and 24 in the 6th concession was an original post, a survey conducted upon the principle stated by the witness would determine the boundary under the statute between lots 28 and 29, as well as between lots 26 and 27 in the 6th concession, but would not establish the line between lots 28 and 29 in the 5th concession, whether that concession was a single or double fronted concession.

Then all that Dean further did was to run for the plaintiff, in 1874, the line between the lots 28 and 29 in the 5th concession. What he says that he did upon that occasion, as I understand him, is, that he went over his work as he had described it done in 1872 for Bateson, relying upon his own previous knowledge, and not making any enquiries whether there was or not evidence to be obtained of the situs of an original post between lots 28 and 29, either on the front or in the rear of the 5th concession.

The letters patent for lots 28 and 29, which were in evidence, *prima facie* shew, I think, that the concession was a single-fronted concession, the lots being granted as whole lots. *Marrs v. Davidson*, 26 U. C. R. 641; *Warnock v. Cowan*, 13 U. C. R. 257, and *Holmes v. McKechin*, 23 U. C. R. 52, 321, are authorities that the description of the lands in half lots is part of the definition of double-front concessions.

Draper, C. J., in *Marrs v. Davidson*, 26 U. C. R., at p. 644, although thinking that the question is not now open, except in a Court of Error, suggests that it may be doubted whether the clause of the statute upon the point should not be read thus: "In those townships in Upper Canada in which the concessions have been surveyed with double-fronts (that is, with posts or monuments planted on both sides of the allowances for roads between the concessions) and the lands in which townships have been described in half lots, the division or side lines shall be drawn,' &c.,—treating the words which are placed in a parenthesis as containing the whole definition of concessions with double-fronts. The words, '*and the lands have been described in half-lots*,' would point out in what cases the side lines are to be run from the front and rear of the concessions to the centre."

As, however, the enquiry whether a concession is a double or single-front concession arises for the purpose of determining in what manner the side lines of the lots shall be run, I cannot see, I confess, any reason to doubt the correctness of the above cases in determining that these words, "and the lands have been described in half lots," do form a necessary part of the definition.

If, then, the 5th concession be in truth a single-fronted concession, the surveyor took no means recognized by law for ascertaining the boundary between the lots, and to displace the *prima facie* evidence afforded by the letters patent granting lots 28 and 29 as whole lots there was no sufficient evidence, in my judgment, offered to establish that it was a double-front concession.

The plaintiff, for the purpose of shewing that it was, produced letters patent, issued in November, 1834, granting to one Thomas Hawkins the south-east and the south-west quarters of lot No. 17 in the 4th concession of the township of Ops. These pieces of land are described in the letters patent as separate quarters, the point of commencement of the description of one being, commencing "where a post has been planted at the south-easterly angle of the said lot," and the other, "where a post has been planted at the south-westerly angle of the said lot." The plan produced by Mr. Dean shews that in the township of Ops the lines between lots run east and west, and the concession lines run north and south, and that the concessions number from the west, so that the south-easterly angle of a lot in the 4th concession would be a rear angle of the lot, and the south-westerly a front angle.

If, therefore, posts were planted at each of those angles of lot 17 in the 4th concession, that would shew that these posts were planted in the front and in the rear of the concession. Whether lot 17 was a corner lot abutting on a side line, or, if it was, whether that would make any difference as to planting a post at the front and rear angle of a lot, although not in a double-front concession, or whether that is never done except in a double-front concession, did not appear; but *Warnock v. Cowan*, 13 U. C. R. 257, is an authority that one concession in a township might be laid out as a double-front concession, and others not. These letters patent for lot 17 in the 4th concession, therefore, are insufficient to establish that the 5th concession was also a double-front concession.

The surveyor Dean also produced an extract from deputy surveyor D. McDonell's field notes of Ops, which he obtained in 1872, when he was about to run the line between lots 26 and 27 in the 6th concession. This extract was used for the purpose of shewing that lot 29 is the last lot in the township, and that the lot 29 in the 6th concession was only 18 chains and 30 links in width. The same paper shews lot 29 in the 7th concession to have been only

14 chains 30 links in width, so that this paper does not shew anything very clearly as to the width of lot 29 in the 5th concession. The paper shews that when running the 6th concession line, which is the line in front of the 6th concession and in rear of the 5th, upon his reaching the extremity of the township, which was a point distant 18 chains 30 links from the commencement of lot 29 in the 6th concession, the surveyor planted three posts, marked No. 29 and R. 5 and 6 Con.; and 50 links further north, in the south line of Fenelon, he planted other three posts, marked R. 5 and 6 Con. So, when running the 7th concession line, being the line in front of the 7th and in the rear of the 6th concession, at the extremity of the township, north of lot 29 in the 7th concession, at the distance of 14 chains 30 links from the south-westerly angle of that lot, he planted three posts, marked No. 29, and R. 6 and 7 Con.; and 50 links further north in the south line of Fenelon, he planted other three posts, marked R. 6 and 7 Con. But no evidence whatever was offered to the effect that this mode of planting and marking posts shewed that a post was planted in the rear of the opposite concession having the number of the lot; or that this mode of planting and marking posts shewed that at the points designated, namely, at the town line at the northern extremity of the township, where it was intersected by these concession lines, the surveyor was planting and marking posts as *only* he would do upon a survey in double-front concessions. That they were so planted at the extremity of the township would not prove that posts had been planted in like manner at the front and rear angles of the lots throughout the concessions.

Why the proper evidence was not obtained from the Crown Lands Department was not at all explained. Doubtless it could have been plainly shewn whether or not the survey had been intended to be conducted, and whether it was in fact conducted throughout upon the principle of double-front concessions; and, moreover, it was necessary to establish that some at least of the lots in the concession

in which the lots, the boundaries of which were to be ascertained, were situate, had been granted in half lots—that is, as I read the statute, having their fronts, the one on the front and the other on the rear of the concession, which in this township would be in east and west halves, or the south and north halves of such half lots. The statute says expressly that each end of such concession shall be the front of its respective half of such concession.

In *Marrs v. Davidson*, 26 U. C. R., 641, Draper, C. J., says, at p. 645: “No uniform system of granting lands in this township of Emily,” (the township there in question) “which would shew how the survey was treated in reference to the division into half lots, seems to have been followed in the public offices.”

And again, he says, at p. 646: “We can see no other way to avoid it” (the difficulty as to construing the statute) “but by holding that where the concessions have double fronts, this, and the express words of the statute, divide the lands into half lots; and when, as in the present case, the concessions run nearly east and west, the division is into north and south halves; *and that the granting of any north or south halves of lots brings the section into application*, even if it must not necessarily apply from the nature of the survey and the posts planted; and that any description in the patents at variance with the actual survey *and the statute must give way.*”

In the case now before us, without the proper evidence of what was done upon the actual survey, and without any evidence of the statutory part of the definition (namely, the describing of the lands in half lots,) being complied with by the grant of any lot in this concession in half lots, and against the *prima facie* evidence contained in the letters patent granting these very lots 28 and 29 as whole lots, we are asked to assume that this 5th concession was a double-front concession, and that the line, at the place in question here (the *locus in quo* being in the rear of the concession), should be run from the rear of the concession, and not from the front.

But it is contended for the plaintiff that it was assumed by the defendants at the trial that the concession was a double-front concession, because the defendants called witnesses to shew that many years ago there was an old post indicating, as they contend, the angle of lots 28 and 29 in the rear of the concession, and which they say stood at or close by the point from which they contend the line should be run, and which the owner and occupiers of lots 28 and 29 have treated as indicating the boundary of the lots.

I cannot see anything in this evidence which could estop the defendants from insisting that the plaintiff, if he will not accept the point designated by the defendants as that from which the line between the lots should be run, should adduce all the evidence necessary to establish the true line to be as the plaintiff contends it is.

I do not understand Mr. Dean to say that in the survey made by him in 1874 he proceeded upon the basis of there having been any original posts found, designating the angles of the lots upon the rear of the 5th concession; but that he proceeded upon the basis of the posts in the front of the 6th concessions, between lots 23 and 24. He made no search for *any* posts in the 5th concession, nor did he make *any* enquiries whether the situs of an original post between lots 28 and 29, if any such had been planted, could be ascertained.

The evidence, as it appears to me, is wholly insufficient to justify the moving of boundaries between lots, and to determine the true line. See *Doe dem. Strong v. Jones*, 7 U. C. R. 385; *Irwin v. Sager*, 21 U. C. R. 371, at p. 377.

The learned Judge who tried the case submitted two questions to the jury, namely:—

1. Is the point contended for by the defendants the place where the original post stood?

2. If not so, then did the plaintiff, when he moved the fence to Dean's line, do so on the understanding between him and them *that the defendants* at that time acknowledged his right, or was it only on the conditional agreement that his possession was to be subject to the correct adjustment of the line?

The jury answered these questions as follows, namely, that the original post had not been proven, and that the plaintiff was given possession by the defendants; and they rendered a verdict for the plaintiff, with \$20 damages.

As to the first question, and the answer of the jury thereto, the jury having been of opinion that the original post had not been proved should have occasioned the verdict, upon the plea of not guilty, to have been for the defendants.

The fact that the post, of which the defendants offered some evidence, was not proved to be an original post, did not relieve the plaintiff from the burthen cast upon him by the issue of establishing by legal evidence the true situs of north-east angle of the lot. This he failed to do: Dean's evidence was insufficient for the purpose; and the defendants have a right to hold him to strict legal proof of the issue joined upon the plea of not guilty.

In my judgment, the case presented no such question as that secondly submitted to the jury. The plaintiff did not at the trial contend that any trespass had been committed upon him, unless the particular piece upon which the defendants Peter and Charles entered to move back the fence which the plaintiff had removed was, as the plaintiff alleges it was, part of lot No. 28. The evidence offered by the plaintiff as to Peter Hepburn consenting to his taking possession, which was denied by the defendants Peter and Charles, was not offered for the purpose of establishing that a trespass had been committed upon the plaintiff, whether the piece referred to was or was not part of lot 28. It was offered wholly *diverso intuitu*, namely, to supplement the insufficient evidence of the surveyor Dean, and as a species of estoppel *in pais* to the defendants asserting that it was not part of lot 28, the plaintiff contending that it was as such that Peter had, as the plaintiff alleged, authorized him to move the fence; but there is nothing upon the record to justify any enquiry whether any trespass had been committed by the defendants, or any of them, upon any land of the plaintiff's other than the particular part of lot 28.

described in the declaration; and to recover in respect of that piece, the plaintiff had to prove it to be (which he failed to do) part of lot 28. To allow him to recover in respect of a piece of land not proved to be within the metes and bounds set out in the declaration, would be to enable him to recover, irrespective of the record, without any complaint of such a trespass, and without any issue.

If a verdict for the plaintiff could be sustained upon the answer of the jury to the second question, and not upon the first, the result would be, that judgment entered upon such a verdict would conclude the parties to this record, that the defendants had entered and trespassed upon the particular part of 28 described in the declaration, although that is the very point which the plaintiff having undertaken to establish has failed to do; and the record of such judgment might prejudice the rights of the defendant Mrs. Hepburn, if it should be sought to make appear hereafter that the piece of land in respect of which such recovery was obtained was not in truth, as it was asserted by the plaintiff to be, a part of 28; there would be great difficulty in shewing that the verdict was rendered without proof of the essential matter raised and put in issue by the plea of not guilty.

The point in issue, in short, was the true situs of a boundary line between lots. That was *the* point sought to be established and concluded by a judgment in this action, and the plaintiff having failed to prove what the issue joined on not guilty cast upon him to prove in order to succeed, the verdict in his favour upon that issue cannot be sustained.

In my opinion, therefore, the verdict must be set aside, and I think the rule for a new trial should be made absolute without costs.

*Rule absolute.*

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## BERTRAM ET AL. V. PENDRY.

*Chattel mortgage—Description of goods—Affidavit—Insolvent Act—Sale en bloc by assignee—Rights of purchaser.*

On December 3rd, 1875, M. & D. mortgaged to the plaintiffs, amongst other goods, a stumping machine, and lumber waggon complete, blacksmiths' tools, lumber, &c., on the mortgagor's premises, which were described, with defeazance on payment of \$1,255 on 1st June, 1876. There was a covenant that the mortgagees might enter and take possession and sell on default, or on any attempt by the mortgagors to sell or part with the possession of the goods without the the mortgagees' assent, but no provision for the mortgagors remaining in possession until default. The affidavit of *bona fides* stated that the mortgage was not made for the purpose of protecting the goods against the creditors of M. & D.—not adding, or either of them, or preventing the creditors obtaining their claims against *him*, instead of *them*. On the 27th March, one F. issued an attachment in insolvency against M. & D., and on the 26th April, H. was appointed assignee. On the same day, H., in consideration of \$300, assigned to F. all his right and interest as assignee to and in all the personal estate, &c., of said insolvents; and on the 26th April, F., after reciting the above purchase, in consideration of \$708, assigned to defendant, out of whose possession, the plaintiffs, on the 17th May, 1876, replevied the goods in question, claiming them under the mortgage.

*Held*, that the plaintiff was entitled to succeed; that in the absence of evidence of the creditors' sanction, the sale by the assignee could not be supported: that it could not be assumed that the assignee intended to pass any title to the goods free from the mortgage: that neither F. nor defendant were in a position to raise objection to the mortgage; and that the plaintiff had a right to replevy, though the mortgage was not due.

*Quære*, whether an assignee in insolvency can raise technical objections to a mortgage not impeachable under the Insolvent Acts.

Per GWYNNE, J.—If the assignee could have avoided the mortgage in the interest of the creditors, he could not transfer such right.

The learned Judge at the trial, also found that the description of the goods in the mortgage, and that the affidavit, were sufficient: that the mortgage was not invalid as creating a preference or under the insolvent law; and that sec. 125 of the Insolvent Act of 1875, did not apply; and the Court concurred in these findings.

**DECLARATION.** Replevin for certain goods and chattels setting them out, and which are described in the chattel mortgage hereinafter set out.

The cause was tried before Patterson, J. A., without a jury, at Peterborough, at the Fall Assizes of 1876.

The plaintiff proved a chattel mortgage, dated 3rd of December, 1875, from a firm of waggon makers, named Macdonell & Desautels, to the plaintiffs, who were hardware merchants in Peterborough, for \$1,255, conveying the chattels described in the declaration, "being now on the premises occupied by the said parties of the first part," the

said mortgagors, "in the town of Peterborough, being part of lot number six, south of Hunter street, and east of Water street, and being composed of one stumping machine, one prize buggy, two new buggies, three old buggies, one lumber waggon complete, eight waggon gearings with bolster crutches, poles, and thimble skeins to complete eight waggons, one lot of bent rims, shafts, and wooden ware, two anvils, three bellows, three vices, stocks and dies, and all tools in the blacksmith shop, a quantity of lumber, basswood, oak, pine, elm, and maple, being all the lumber now on the premises." *Habendum* absolutely, with defeazance on payment of the sum mentioned, on the 1st of June, 1876, with interest at 8 per cent.

There was no covenant for the mortgagors remaining in possession till default. There were covenants that the mortgagees might enter, take possession, and sell on default of payment or attempt by the mortgagors to sell or part with the possession, or to remove the goods beyond the county without the mortgagees' assent.

The proviso was, that "it shall not be incumbent on mortgagees to sell the goods, but on default they may quietly hold and possess them."

The mortgagees were declared to be put in full possession by delivery to them "of these presents."

It appeared further that an attachment in insolvency, dated the 27th of March, 1876, was issued at the suit of John Finlay, against the mortgagors.

A notice was put in signed by James Harper, declaring that he had been appointed assignee, and that the creditors were to file their claims, &c. This was dated the 24th of April, 1876.

A certificate was also filed, that Harper had been appointed assignee at a meeting of creditors on the 24th of April, 1876.

On the same day there was an assignment by Harper as assignee to John Finlay, in consideration of \$300, of "all claims, right, title, and interest of him as assignee, to all the personal estate, rights, and credits, of said insolvents, or either of them, with the evidences of debt and securities

thereto appertaining, but without any warranty of any kind or nature whatsoever."

An assignment was also proved, dated the 26th of April, 1876, from Finlay to the defendant, reciting the purchase from the assignee, of "all and singular the estate and effects of the said Charles Macdonell and Dumas Desautels as such insolvents and all the interest of the said assignee therein," and that Finlay had agreed with the defendant to sell the same to him for \$708. Then, in consideration of \$800 he assigned to defendant all the estate, effects, rights, and credits, &c., and "all the interest, right, and title of him, the said party of the first part, therein or thereto of the said Charles Macdonell and Dumas Desautels and each of them."

On the 17th of May, 1876, the plaintiffs sued out the writ of replevin, and the goods were taken out of the possession of the defendant.

The following is the judgment delivered by the learned Judge at the trial.

"The plaintiffs replevied the goods in question, claiming them under a chattel mortgage from Macdonell and Desautels.

"The defendant claimed them as purchaser from one Finlay, and on the ground that they passed to Finlay under an assignment from Harper, the assignee in insolvency of Macdonell & Desautels, of all the claim, right, title, and interest of Harper, as such assignee, to all the personal estate, rights, and credits of the insolvents.

"The chattel mortgage was made to secure a large debt which the insolvents owed the plaintiffs. It is dated the 3rd of December, 1875, and was filed on the 6th of December, 1875. The attachment in insolvency issued on the 27th of March, 1876.

"The validity of the mortgage is attacked, on the ground that it comes within the provisions of Consol. Stat. U. C. ch. 26 sec. 18.

"I am quite clear that this objection is not sustained. There was no intent to prefer. And I am not satisfied that the parties could properly be said to have been in

insolvent circumstances or unable to pay their debts in full, or that they knew themselves to be on the eve of insolvency.

"It is also objected that under section 132 of the Insolvent Act the mortgage is void, because made with intent, &c., that intent being presumed under the provisions of sec. 130.

"The only witnesses who speak to any facts concerning the circumstances of the insolvents, are the plaintiff John Bertram, and the insolvent Macdonell.

"I should have not only to disbelieve their evidence, but to draw an inference contrary to it without any sufficient grounds, before I could hold that when the insolvents made the mortgage they were unable to meet their engagements, or that they were incapacitated otherwise than temporarily from paying the plaintiffs, or that the plaintiffs knew such inability, or had probable cause for believing it to exist. And it certainly had not become public and notorious. And further, I could not lay my finger on any evidence that creditors were injured, obstructed, or delayed by the transaction.

"It is objected that the mortgage not being due the plaintiffs are not entitled to the possession, and so cannot bring replevin.

"This is founded on the assumption that the mortgagors were entitled to remain in possession until default, but this mortgage does not contain such a provision.

"It further objected that replevin will not lie, but that the plaintiffs' only remedy is under section 125 of the Insolvent Act.

"It does not seem to me that this section has any application, except in cases in which a remedy is sought against the assignee, which is not the present case.

"Then there are two objections made to the mortgage itself: one by reason of a defect in the affidavit: the other asserting the insufficiency of the description of some of the goods. The affidavit states that the mortgage is not made for the purpose of protecting the goods against the creditors of Macdonell, and Desautels, the mortgagors, or preventing the creditors of the mortgagors from obtain-

ing payment of any claims against *him*, instead of *them*. If the objection is the want of certainty, the answer is, that a more serious defect in this respect is, that the affidavit does not negative the purpose of preventing the separate creditors of each mortgagor from obtaining payment of their claims. But the absence of the words, 'or either of them,' has been decided not to vitiate, because the statute does not in terms require them. The same rule applies to preserve the mortgage as against the objection now in question.

"The articles, which it is urged are not sufficiently described, are the stumping machine and the lumber waggon complete. These are described, with the other articles, as being at the date of the mortgage on the premises occupied by the mortgagors, being part of lot 6, south of Hunter street and east of Water street.

"The objection is not, that this description is on its face insufficient; but that in fact the stumping machine was not within a mile of the premises, and had never been on them; and that the waggon was on the opposite side of the road from lot 6.

"It is further contended that tools described as in the 'blacksmith shop,' are not sufficiently described: that lumber, and a lot of bent rims, shafts, and wooden-ware, ought to be more specifically described, and that a drilling machine and a tire upsetter, which were replevied, were not tools, and so were not covered by the mortgage.

"I think the last two instruments are tools, and are properly so described.

"The general description of the lumber is as specific as it well could be, and so is that of the bent rims, shafts, and wooden ware; and I think that all the articles of the latter class passed as 'the lot,' notwithstanding that they may have been in different heaps in several parts of the shop. '*The blacksmith's shop*' would, in my opinion, have been unobjectionable, even if those words had stood unaided, but they are covered by the general statement that all the goods are 'now on the premises, &c.' They merely desig-

nate with more particularity the part of the premises. The stumping machine was made by the mortgagors, and was the only one they ever made or had. I think the name sufficiently describes it, on the authority of *Mills v. King*, 14 C. P. 223, where 'one omnibus' was held to be sufficient; and 'one lumber waggon complete,' is, I think, as specific as 'one omnibus,' or as '14,415 feet of prepared moulding,' which Draper, C. J., held sufficient in *Noel v. Pell*, 7 U. C. L. J. 422.

"The question which might be raised, as to whether the mortgage would pass any article which was not on the premises, is not a question under the statute. And I should hold that apart from the statute, the stumping machine and the waggon did pass, the reference to the premises being *quoad* those articles *falsa demonstratio*.

"There is another ground taken against this defendant, which is, in my judgment, a serious obstacle to his succeeding. His title is under the assignment from the official assignee to Finlay, the attaching creditor, in consideration of \$300. Did any right to this property pass to Finlay? The goods replevied are shewn to be worth \$700, and they do not comprise all that the mortgage covered. The stumping machine and waggon are worth about \$300, and it is apparent, or at least there are strong reasons for surmising, that if this claim can be established, the defendant or Finlay will make several times the \$300, which they paid, by the transaction. I do not believe that the mortgaged goods can have been contemplated by the official assignee as part of what he sold to Finlay. My impression is, that the mortgage being good between the parties to it, was, if open to the objections now taken, only voidable by the assignee by reason of those objections. He never avoided it, and no right to treat it as void, and to claim the goods as conveyed to him, passed to Finlay.

"I enter a verdict for plaintiffs on the second count, and on all the issues on the first count but the first. And a verdict for the defendant on the first plea to the first count."

In Michaelmas term, November 29th, 1876, *Armour*, Q.C., obtained a rule *nisi* under the Law Reform Act to set aside the verdict for the plaintiffs and to enter a verdict for the defendant, as to all of the goods, or to some of the goods only.

In this term, February 14th, 1877, *J. K. Kerr*, Q. C., shewed cause. The mortgage cannot be attacked on the ground of fraud. There is nothing to shew that the mortgagors were insolvent, or any intent to create a preference, so as to bring it within section 18 of the Insolvent Debtors Act, Consol. Stat. U. C. ch. 26, and of section 132 of the Insolvent Act of 1875: *Jameson v. Kerr*, 8 U. C. L. J. 240; *McFarlane v. McDonald*, 21 Grant 319; *Wells v. Hews*, 24 Grant 131. The mortgagees were entitled to take possession, for there being no redemise clause the mortgagors were not entitled to hold possession until default: *McAulay v. Allen*, 20 C. P. 417. Section 125 of the Insolvent Act of 1875 does not apply, as the remedy sought is not against the assignee. The use of the word "him," instead of "them," in the affidavit of *bona fides* cannot of itself render the affidavit insufficient. The whole affidavit must be looked at, and it shews that each of the mortgagors was intended. The affidavit is also sufficient to include the separate as well as the joint creditors: *Taylor v. Ainslie*, 19 C. P. 78; *Fraser v. Bank of Toronto*, 19 U. C. R. 381. The description of the goods is sufficient: *Mills v. King*, 14 C. P. 223; *Mathers v. Lynch*, 28 U. C. R. 354; *Noel v. Pell*, 7 U. C. L. J. 422; *Re Thirkell*, 21 Grant 492. In *Mason v. Macdonald*, 25 C. P. 435, where the description was held insufficient, there was the omission of locality, which is contained here. The goods covered by the mortgage never passed under the assignee's sale. He did not intend to sell them; at all events the sale being *en bloc*, and without the consent of the creditors, was void.

*Armour*, Q. C., contra. The mortgage was fraudulent. The mortgagees were insolvent at the time, and it amounted to a preference, and is void both under the Insolvent Debtors' Act as well as under the Insolvent Act. It was also a disposal of the mortgagor's whole stock in

trade, and therefore on this ground an act of insolvency: Sec. 2 subsec. j. secs. 130, 133. The presumption of insolvency is irrefutable: *Brooks v. Taylor*, 26 C. P. 443; *Re Caton*, 26 C. P. 308; *Davidson v. Ross*, 24 Grant 22. The goods passed to the assignee, and the plaintiff, instead of bringing replevin, should have claimed under section 125 of the Insolvent Act: *Crombie v. Jackson*, 34 U. C. R. 575; *Munro v. Commercial Building &c., Society*, 36 U. C. R. 464; *Watson v. Henderson*, 25 C. P. 562. The section also extends to those claiming under the assignee. The affidavit of *bona fides*, as also the description of the goods, is insufficient: *Rob. & Jos. Digest* 587. There is nothing improper in the sale by the assignee, and the creditors subsequently affirmed it.

March 9th, 1877. HAGARTY, C. J.—The learned Judge after a very clear and careful statement of the case with all the objections urged at the trial, entered a verdict for the plaintiff.

I do not feel warranted in differing from the conclusions drawn by the learned Judge as to the good faith and validity of the mortgage, and as to its not coming within the operation of the insolvent law. A perusal of all the evidence induces me to acquiesce in his finding on this branch of the case.

Assuming the mortgage to be valid as against this objection, we have to consider the position of the defendant.

He sets up a right acquired by purchase and transfer from Finlay. Finlay claims to purchase from the assignee. The assignee was not called as a witness, and no evidence whatever was offered to shew how the assignee was appointed, or to explain the extraordinary circumstance that, on the very day of his appointment, he professes to sell the estate *en bloc* to Finlay, an attaching creditor.

It is not shewn that the creditors ever approved of such a sale.

Section 38 of the Insolvent Act of 1875 provides that no sale of the estate *en bloc* shall be made, without the

previous sanction of creditors given at a meeting called for that purpose, and provided that no such sale shall affect, &c., or postpone payment of any mortgage or privileged claims on the estate.

Section 39 directs the assignee shall have the exclusive right to sue for the recovery of debts, rescind agreements, &c.

We do not feel warranted in acceding to the defendant's argument that on this evidence he shews a right to claim these goods, or to raise technical objections based on the Chattel Mortgage Act.

Is it right for us to assume that the assignee did in fact sell or profess to sell either this mortgage or the goods therein embraced, or any interest thereunder?

His duty would have been to have investigated and settled the rights of these mortgagees. He could have contested the security on any proper grounds. He could have arranged with the plaintiffs for a valuation of their security. But we are certainly not prepared to say that he in fact did convey any interest in these goods to Finlay, who is said to be the creditor issuing the attachment.

Is the vendee of Finlay in a position to raise any statutable objection to this mortgage?

The statute Consol. Stat. U. C. ch. 45, sec. 4, declares that the absence of certain prescribed formalities shall make the mortgage "void as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith."

We do not know that the defendant was a creditor, nor in fact whether Finlay was a creditor. The latter purchases, as he says, the whole estate for \$300. These mortgaged goods were said to be worth \$700, and the assignment by Finlay to Pendry states the price as \$708.

We do not know whether the assignee professed to sell them at all, or that he only designed to sell or did sell more than the equity of redemption remaining in the insolvents. The time of payment under the mortgage had not arrived till after the insolvency and the sale.

But the mortgagees find the goods mortgaged to them in

the hands of the defendant, who claims to be a purchaser under the clause in the mortgage enabling them to take possession in the event of any sale or removal.

This renders it unnecessary to enter on the discussion raised in *McAulay v. Allen*, 20 C. P. 47.

Nor are we necessarily required to decide that the assignee in insolvency can or cannot urge these technical objections to a mortgage, not in any way impeachable on the insolvent laws.

In a late case, *Re Mapleback*, L. R. 4 Ch. D. 150, Lord Justice James says, at p. 156: "However wrong the transaction may have been in law, it was no wrong against the Bankrupt law; there was nothing done with intent to delay or to defeat creditors, or to defraud any one. For all purposes of the bankrupt law, the bill of sale was a bill of sale for a past debt, and a sufficient present advance. And, except where there is an offence against the bankrupt law, or against some law in favour of creditors, the trustee" (or assignee) "is merely the legal representative of the debtor with such rights as he would have had if not bankrupt, and no other."

That was a peculiar case, where a debtor owing a creditor £100 forged his name to a bill for another £100, and then threw himself on his mercy, and induced him to pay it, giving him a bill of sale over all his effects for the £200. The creditor had got possession under the bill of sale, and on appeal his right was upheld, *potior est conditio possidentis* being applicable as between him and the bankrupt.

No question arose as to any noncompliance with statutory formalities.

The Imperial Bills of Sale Act, 17 and 18 Vic. ch. 36, declares they shall be void, unless the statutory formalities be complied with, as against the assignee in bankruptcy, as to goods in the bankrupt's hands at the filing of his petition, or his assignment, and after the expiration of the twenty-one days allowed for registration, &c., of the bill of sale.

Our Act has not this express provision, but we must not be understood as deciding the question.

The evidence here does not, we think, call for it.

We think that on the facts before us the plaintiffs have shewn a *primâ facie* right to these goods by conveyance from the original owners, apart from the formalities required by the Chattel Mortgage Act, and that the defendant has shewn no title or right in himself to raise the objections to the plaintiffs' security.

We are of opinion that the verdict, as rendered by the learned Judge for the plaintiffs, should stand.

This will probably not prevent any proceeding that the assignee in insolvency may be advised to take as to this property for the benefit of the estate.

We may refer to our judgment also given to-day in *Mason v. Merchants Bank*, (a) on some of the points arising in this case.

GWYNNE, J.—I express no opinion, whether or not, upon the facts appearing in evidence in this case, the assignee of the insolvent mortgagors could avoid the mortgage under which the plaintiffs claim the goods in question, a decision upon that point being, in my judgment, wholly unnecessary for the determination of the present case.

There is, in my judgment, nothing in the objection that the action is too soon, the mortgage not having been due when the goods were replevied. For the plaintiffs, finding the goods in the possession of the defendant, claiming them as his own absolute property, were, in my opinion, quite justified in taking them, even if the mortgagor was entitled to retain them in his possession until default, notwithstanding that there was no express clause in the mortgage to that effect.

The plaintiffs' right to succeed in this action I rest upon the *primâ facie* validity of the mortgage, and that the defendant has failed to establish any title to the goods mortgaged, derived from the assignee in insolvency.

There is nothing in the evidence establishing any

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(a) See post page 383.

authority vested in the assignee by the creditors to make the sale *en bloc* of the insolvent's estate, which the deed from the assignee to Findlay purports to be.

There is nothing to warrant the conclusion that either the creditors, or the assignee himself, contemplated or intended that any title in the goods freed from the mortgage should pass by the deed which has been produced.

If there be anything which warrants the avoiding of this mortgage at the suit of the assignee in the interest of the creditors, that is a matter which should be determined at the suit of the assignee; such a right the assignee can not, in my judgment, transfer to another.

The plaintiffs are, in my judgment, entitled to succeed in this action, upon the simple reason that, being mortgagees from the true owners at the time of the execution of the mortgage of the goods in question, they find them in the possession of the defendant, who establishes no legal right or title to the possession of the goods derived from the mortgagors, nor any title to the goods superior to that of the mortgagors. The plaintiffs must therefore prevail against the defendant; and any right, if any there be, to avoid the mortgage, or to redeem it in the interest of the creditors, must be left to be dealt with by the assignee as he may be advised or directed in the ordinary manner by the creditors of the insolvent, in accordance with the provisions of the Insolvent Act.

GALT, J., concurred.

*Rule discharged.*

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## MASON, ASSIGNEE, v. THE MERCHANTS' BANK.

*Insolvency—Sale of estate en bloc—What passes under—Right to dispute securities.*

On the 7th of December, 1874, one L. made an assignment under the Insolvent Act of 1869, and the plaintiff was appointed assignee. On the 28th December, defendants filed their claim for \$132,721.43, setting out certain warehouse receipts held by them as security, valued at \$8,627.43, and other securities, also valued, which reduced the claim for proof to \$99,458. At a meeting of creditors held on the same day a proposal of a firm of L. & C. to purchase the estate en bloc for \$50,000, was accepted. On the 29th December, by resolution of the inspectors, defendants were authorized to retain these receipts at their valuation. On the 13th January, 1875, at a meeting of creditors, it was resolved that further enquiry should be made as to the validity of the receipts, and that the resolution of the inspectors be rescinded, but nothing more was done under it. On the 3rd February, 1875, a deed was executed by the assignee, which, after reciting the agreement for sale to L. & C., the assignee conveyed certain real estate specified, "and all the entire estate, stock in trade, book debts, and effects of said insolvent, of every nature and kind soever, and all the interest of the creditors in the said estate and effects," to hold "the same, and all benefit that can or may be derived therefrom, unto said purchasers." L. & C. were creditors of the estate, and had been present at all the meetings of creditors. After this conveyance, a dividend was declared and advertised, to which no objection was made, and the bank received it on the reduced amount, \$99,458, proved for by them. Subsequently L. & C. brought this action in the name of the assignee for the goods covered by the warehouse receipts, on the ground that the receipts were invalid. The assignee, however, stated that he had never objected to their validity, and had intended to allow defendants to retain them; and had given no consent to this action being brought in his name, except what was contained in the transfer; and there was no further evidence shewing that the assignee sold or intended to sell, or L. & C. to purchase the property in dispute.

*Held*, that the action would not lie, for that the claim did not pass under the transfer by the assignee, who had not authorized the suit, and the Court refused to substitute the names of L. & C. as plaintiffs.

*Quære*, whether, after what had been done by the assignee and inspectors, the claim could have been assigned.

**DECLARATION.** First count: Trover for the conversion of certain goods by the insolvent, W. M. Lottridge, before his insolvency.

Second count: Trover by the plaintiff as assignee in insolvency of the said W. M. Lottridge.

Third count: that the said W. M. Lottridge being indebted to the defendants in a large sum of money, did within thirty days next before the execution of a deed of

assignment under the provisions of the Insolvent Act then in force by him the said W. M. Lottridge, pay to the defendants the sum of \$17,000 on account of such indebtedness. And the plaintiff says that the said W. M. Lottridge at the time of such payment was unable to meet his engagements in full, and that the defendants knew such inability or had probable cause for believing the same to exist, and that no valuable security was given up by the defendants in consideration of such payment, and the plaintiff as assignee as aforesaid elected to avoid such payment, and demanded the said sum of money from the defendants, and all conditions were performed, &c., yet the defendants have not paid the same.

The common counts were added.

To the first and second counts the defendant pleaded not guilty, and not possessed.

To the third count, a denial of the payment as alleged,

To the common counts: never indebted.

The cause was tried before Sinclair, County Judge, sitting for Wilson, J., without a jury, at Hamilton, at the Winter Assizes of 1877.

It appeared that an assignment in insolvency was made to the plaintiff, dated the 7th of December, 1874, and on the 23th of December the plaintiff was appointed assignee.

On the same day the defendants filed their claim. The total debt due to them was put down at \$132,721.43, setting out certain securities, namely warehouse receipts, described in a schedule, and valued at \$8,627.43, and collaterals, also valued, reducing the claim for proof to \$99,458.

At a meeting of creditors held also on the same day, a proposal by Lamb & Cross to purchase the insolvent estate *en bloc* was accepted.

Five inspectors were appointed, under the Act of 1869.

On the 25th of December, the inspectors passed a resolution that: "The assignee was authorized to consent to the retention of the goods held by the Merchants' Bank under certain warehouse receipts by the bank at the valuation placed by the bank upon them."

Messrs. Lamb & Cross were also creditors, and had proved for \$9,350. They were said to have been present or represented at all the meetings of creditors.

On the 13th of January, 1875, at a meeting of creditors, it was resolved: "That the creditors are of opinion that the inspectors should make further enquiry into the validity of the warehouse receipts held by the Merchants' Bank before allowing the valuation and retention thereof by the bank, and that the resolution of the inspectors, allowing such retention be rescinded." Nothing was done on this last resolution, as was stated by the assignee.

On the 3rd of February, 1875, a deed was executed by which—after reciting Lottridge's insolvency and assignment, and the plaintiff's appointment as assignee, and that at the meeting of December 28th, it had been considered desirable to dispose *en bloc* of the estate, and that Lamb & Cross had offered \$50,000 in cash for the entire estate, the purchaser to pay all excise and customs duties thereon, and that all the terms and conditions had been approved of at a meeting of creditors,—the assignee conveyed certain parcels of real estate, and also "all the entire estate, stock in trade, book debts, bills of exchange, promissory notes and effects of said insolvent of every nature and kind soever \* \* and all the interest of the creditors in the said estate and effects." *Habendum* (following the description of the realty) "the same and all benefit that can or may be derived therefrom unto said purchasers.

There was a covenant by the assignee that he had the right to convey, notwithstanding any act as assignee, and for further assurance, and making the purchasers his attorneys irrevocable to take all legal and necessary proceedings to sell, dispose of, realize, and collect in the said estate, but at the purchasers' cost.

On the same day Lamb & Cross gave their bond to the assignee. It recited that the assignee had contracted to sell part of the estate to Wilson & Co.: that Lamb & Cross had agreed to buy the whole *en bloc*, and to assume the assignee's position towards Wilson & Co. The bond was

then conditioned to indemnify the estate in every respect as to the sale to Wilson & Co., and to indemnify the assignee, and the insolvent estate, from and against any consequences arising out of the sale of the estate to Lamb & Cross.

On March 29th, 1875, a dividend sheet was prepared and advertised in the usual manner, payable 20th April, 1875. No objection was made thereto by any person. The bank received its dividend on their claim as finally proved, less the values of the securities and warehouse receipts, the effect being that the amount of the value of property covered by the warehouse receipts was deducted from their claim, and the dividend paid on the reduced amount.

The firm of Lamb & Cross had also proved for \$6,350, and received dividend thereon.

The assignee stated that he had \$2,500 still on hand. Nothing was said as to whether there were any claims against this sum, or how it was available.

The assignee also stated : " This action is not brought for my benefit, as official assignee. Mr. Bruce, acting for Lamb & Cross, asked me for authority to make demand on the defendants for the property covered by the warehouse receipts ; but I refused. I never elected to demand any sum of money from the defendants. I intended to allow the defendants to retain their security. I thought the defendants' valuation a fair one. I never made any objection to the validity of the warehouse receipts. I never contemplated taking any objection to their retention by the defendants. This suit is being carried on by Lamb & Cross, and I have given no further consent to bring it than is contained in my assignment to them."

This action was commenced on the 7th March, 1876.

The learned Judge entered a verdict for the defendants.

In Michaelmas term November 22nd, 1876, *Bruce*, (Hamilton,) obtained a rule *nisi* under the Law Reform Act to set aside the verdict entered for the defendants, and to enter a verdict for the plaintiff.

During this term, February 14th, 1877, *Robinson*, Q. C., and *Edward Martin*, Q. C., shewed cause. The pledge to the bank was valid. The advance and the warehouse receipts were contemporaneous: 34 Vic. ch. 5 secs. 1-3, and 46-50; *Royal Canadian Bank v. Clarkson*, 19 C. P. 102; *Royal Canadian Bank v. Miller*, 28 U. C. R. 593, 29 U. C. R. 266. The assignee, under the resolution passed by the inspectors, consented to the defendants retaining the security; and although there was a subsequent resolution of the creditors, nothing was done under it. Lamb & Cross never purchased this claim. They, with the knowledge of all the facts, purchased the estate. The assignee never intended to assert any right to it, and the words of the transfer would only include the estate as it then stood. At all events the assignee can only sue while assignee, and not after the estate has passed out of his hands. The action, if at all, must be instituted by Lamb & Cross: *Insolvent Act of 1875*, secs. 10, 42-48, 58-71.

*Bethune*, Q. C., and *Bruce* (Hamilton), contra. The warehouse receipts were given for an antecedent debt and while Lottridge was insolvent, of which the defendants were aware; and the learned Judge has so found. The pledge was, therefore, void, and defendants had no right to retain them, but they passed as part of the insolvent's assets to the assignee, and so to Lamb & Cross, under the transfer to them. The assignee had no power to assent to the defendant retaining the securities without the consent of the creditors, and the resolution of the inspectors was insufficient as it was not unanimous. The assignee does not state that he consented; and there is no evidence of any assent. But even if he did assent, he cannot bind the creditors. If the right of action did not pass to Lamb & Cross, then the assignee can properly sue. If, however, it passed to them, then they should be substituted as plaintiffs. No injustice will be done by the verdict being entered for the plaintiff, for the defendants can still come in and prove, as there is sufficient in the assignee's hands to pay their dividend: *Ex parte Moulson*, 2 Rose 55;

*Ex parte Dewdney*, 15 Ves. 479 ; *Ex parte Roffey*, 19 Ves. 468, 1 Kerr 272 ; *Ex parte De Tasted*, 1 Rose 324 ; *Nichols v. Grant*, 10 Grant 15 ; *Prosser v. Edmonds*, 1 Y. & C. 481 ; *Deacon on Bankruptcy*, 3rd ed., vol. i., p. 672.

March 9th, 1877. HAGARTY, C. J., delivered the judgment of the Court.

Up to about the commencement of the action, we cannot find any steps taken or enquiry made on behalf of the estate regarding the defendants' claim on the property mentioned in the warehouse receipts.

We can find no evidence bearing on the very important question whether Lamb & Cross, as a matter of fact, did purchase, or whether the creditors, or the assignee on their behalf, did sell or intend to sell, the property or proceeds of property in dispute. The whole purchase money was \$50,000. It seems difficult to believe that nothing was arranged or understood as to this large claim of \$8,000 or \$9,000, about one-sixth of the \$50,000.

By sections 41 and 42, of the Act of 1869, the assignee's duties are defined. Nothing is to prevent him from selling the entire estate and effects, real and personal, in one lot, upon such terms and conditions as to payment or assumption and payment of mortgages, &c., and payment of privileged debts, requiring the sale and terms to be approved by the creditors.

Sec. 42. That the assignee should have exclusive right to sue for debts, for rescinding agreements, deeds, &c., in fraud of creditors, recovery of moneys, &c., and taking proceedings that the insolvent or a creditor for the general benefit of creditors may take.

Sec. 44. The assignee may sell debts, but all debts over \$100 are to be sold separately, except as otherwise provided.

Sec. 46 enacts that the purchaser of a debt may sue in his own name.

Sec. 61 enables the assignee to consent to the retention and valuation of securities held by creditors, &c., and

Sec. 62 enacts, that when a secured claim is filed and the security valued, the assignee shall procure the authority of the inspectors or of the creditors at their first meeting thereafter to consent to the retention of the security, or to require an assignment or delivery of it. If any meeting of inspectors or creditors take place without deciding on the course to be adopted in respect of such security, the assignee shall act according to his discretion and without delay.

At the time of the sale of the estate to Lamb & Cross by the assignee, we are informed that all of the goods held by the defendants under the warehouse receipts had been sold by the defendants. There were therefore no goods or property in the defendants' hands at that time. If the defendants had no title to these goods vested in them by the warehouse receipts the assignee could have held them responsible for the goods or the moneys realized by their sale, and at the time of the sale to Lamb & Cross a right of action existed in him therefor.

Had he neglected his duty, or under the authority of the creditors or inspectors, (sec. 45,) refused or neglected to proceed for the benefit of the estate, a creditor could be allowed by the Judge to sue in the name of the assignee, and have the benefit derivable therefrom for himself; but if before order granted the assignee signify to the Judge his readiness to proceed for the benefit of the estate he may do so within a time to be named.

The assignee's evidence in this case, shews that the suit is not his, nor for the benefit of the estate, and that he assented to the defendants holding the security at the valuation made by them, and he declined authorizing a demand on them therefor.

On his evidence, and on reading the documents produced, I am of opinion that a nonsuit should have been entered.

On the face of the assignment to Lamb & Cross, I cannot see any intention or intendment to be gathered from the words used, that the assignee was conveying or designing to convey any right of action against these defendants, in

respect of these securities. It seems to have been the ordinary sale *en bloc* allowed by the statute of all unrealized assets of the estate. Whether this claim on the defendants could be considered as an asset of the estate, would naturally be a matter to be decided by the assignee and the creditors.

I think it impossible to hold that such a claim would pass under the words used in this assignment, at least in the absence of any evidence whatever, either that the assignee and creditors intended to sell, or that Lamb & Cross understood they were buying any right to proceed against the bank.

It will be quite time enough to discuss whether, after the course taken by the assignee and the inspectors, and the proof and dividend paid on the reduced amount, a right to sue the bank can or could be legally assigned to Lamb & Cross, when we find it proved that such a right was actually sold or assigned.

At present we fail to see any proof thereof.

It was argued that we could now add Lamb & Cross as plaintiffs, or substitute them for the assignee.

We think this should not be allowed, and that the evidence shews no valid reason therefor.

If Lamb & Cross be so advised, they can sue in their own names for any right they consider to have passed to them.

This suit of the assignee, we think, fails.

*Rule discharged.*

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## McCORD V. FIELD ET AL.

*Partnership—Authority to bind the firm by notes.*

In April 1876, F. & C. entered into partnership for the purpose of purchasing one M's interest in a macadamized road contract and completing it; C. alone to provide the necessary funds on his own credit, but F., for the use of his name to secure the contract, to have half the profits. On 2nd May, C., being in want of funds, made a note in his own name for \$150, which was endorsed by one Cockburn, and the proceeds applied to the partnership purposes. On 25th May, he made two further notes for \$175 respectively, one in the name of the firm and the other in his own name, but of the proceeds of the latter note \$87 was applied to partnership purposes. Both these notes were also endorsed by Cockburn. At the same time C. also made a note for \$500 in the name of the firm in favour of Cockburn, as security for his above endorsements. This note Cockburn endorsed to the plaintiff, but without any consideration, and the plaintiff merely stood in Cockburn's place.

*Held*, that there could be no recovery on this note, for as to the \$150 and one of the \$175 notes, they were not made in the partnership name; and as to the other \$175 note, it was outstanding in the hands of a third party.

*Semle*, that one partner in such a business has no implied authority to raise money, even for partnership purposes, in the joint name.

THIS was an action brought by the plaintiff as endorsee of a promissory note, dated 25th May, 1876, payable to the order of Isaac Cockburn, for \$500, payable at three months after date, and endorsed to the plaintiff.

*Plea: non fecit.*

The cause was tried before Wilson, J., without a jury, at Toronto, at the Winter Assizes of 1877.

It appeared that the defendants Field and Coleman, in the month of April, 1876, entered into partnership to purchase the interest of one McBryan in a macadamized road contract at Ottawa, and to complete the work.

After the agreement between the defendants, which was not reduced to writing, had been entered into, Coleman, being in want of money, on the 2nd of May made a note, in his own name, for \$150, which was endorsed by Cockburn, and the proceeds applied, according to Coleman's evidence, for partnership purposes.

On 25th May, he made two notes for \$175 each, one in his own name, and the other in the name of the firm.

These notes were also endorsed by Cockburn; and at the same time Coleman made the note now sued on for \$500, in the name of the firm, in favour of Cockburn, as security for his endorsement of the three notes above mentioned. No money was paid by Cockburn for this note.

The learned Judge found as follows: "I decide that there was a partnership between Field and Coleman to carry on the contract referred to: that it was agreed between them that Coleman should raise all the money required, upon his own credit and responsibility; and that Field was not to advance any money, but was, for merely lending his name to secure the contract, to receive one-half of the profits."

The learned Judge entered a verdict for the plaintiff for \$262, made up as follows: the amount of the note for \$175, made in the name of the firm, and \$87, being a portion of the other note, which had been expended for partnership purposes, the remainder not having been so applied; and he disallowed any claim on account of the \$150, because it had been drawn in Coleman's own name, and because that loan was made on his own credit, and he raised the money just as it was provided between him and Field he should do.

In this term, February 6th, 1877, *Osler* obtained a rule *nisi* under the Law Reform Act, to set aside the verdict for the plaintiff and to enter a nonsuit or verdict for the defendants.

During the same term, February 17th, 1877, *Thorne* shewed cause. The note sued on was given as a guarantee for the previous notes, and is founded on a good consideration. The plaintiff is entitled to recover for any indebtedness incurred by the firm. Even if there were no authority as between the partners themselves, to use the partnership name, and to incur liabilities for the benefit of the firm, there was clearly authority as regards third persons. The defendant is liable on the \$175 note, which was signed in the firm's name, and the proceeds applied to

the partnership purposes. He is also liable for the \$87, portion of the other note for \$175, which was applied to the partnership purposes. The verdict, therefore, should not be disturbed.

*Osler, contra.* The plaintiff can only recover, if at all, on an implied authority to use the partnership name, for it was expressly agreed between the partners that Coleman was to provide the funds for carrying on the contract, and that no liability was to be imposed on the defendant. There is, no implied authority in partnerships of this character for the individual partners to sign notes in the name of the firm. Assuming, however, that there was such authority, there could be no liability as regard the \$150 note and one of the \$175 notes, as they are not signed in the partnership name; and as regards the other \$175 note, Cockburn had notice of Coleman's want of authority; at all events, it cannot form any part of the consideration of the note now sued on, as it is in the hands of a third party: *Tudor's L. C. on Mercantile Law*, p. 302.

March 9th, 1877. GALT, J.—In my opinion the findings of the learned Judge are fully borne out by the evidence. The point of dispute in this case, is, whether the plaintiff, who as shewn by the evidence is merely a trustee for Cockburn, can recover the whole or any portion of the notes sued on, under the circumstances:

There is no question but that one partner has the power to bind his co-partners in all matters arising out of the partnership. It is also established that, in ordinary mercantile partnerships, this may be done by giving promissory notes or accepting bills of exchange in the name of the firm; but it does not follow that such an authority exists in the case of all partnerships, and, although it may be considered, as suggested by the learned Judge, "that as a rule trading partnerships only can do so, I am disposed to extend that rule to meet the necessities of labour requirements. No railway could be built without such a power, nor any large enterprize carried on." He adds: "If there

is no inherent power here in the parties to make notes, I do not think that it is to be inferred that it was agreed or understood that notes should be given." On the contrary, it was shewn that the agreement between Field and Coleman was that the latter should provide all the funds necessary.

It may, for the sake of argument, be assumed that Coleman was justified in using the name of the firm to raise money for partnership purposes, but that will not affect the present case; for if such authority existed, it could not be exercised in favour of a person taking a note under such circumstances that he must have known it was not given with that view, and that the partnership derived no benefit from it. Coleman had, some three weeks before the \$500 note was made, given one in his own name for \$150, and when the note now in question was signed, he made two others, one for \$175 in the name of the firm, and the other in his own. The partnership then was liable only on the note for \$175, and although the learned Judge allowed \$87 on the other note, as being a portion of the proceeds applied to partnership purposes, still the firm were not liable on that note.

It is unnecessary to decide the question as to the responsibility of the defendant on the \$175 note, for that note is not before us.

This action is brought in the name of an endorsee, who is suing for the benefit of a party who took a note made in the name of the partnership, and the consideration on which it was given was, that the payee had endorsed these notes, on two of which the partnership was not liable, as they were made in the name of Coleman alone, and on the third they were liable already.

The case then is, that Coleman had raised money on his own credit, part of which the learned Judge has found was applied to the partnership business, and then, to secure the endorser, he gave him the partnership note not only for the the money so applied, but also for the balance which he had expended for his private purposes, and includes an

amount for which the firm was already liable on another note of the same date.

I confess that this appears to me to be a very singular transaction, and that before receiving the note now sued on, the payee should have satisfied himself that Coleman had authority to make it.

It is plain that as respects the note for \$175 made in the name of the firm, there was no reason whatever for including it in the \$500 ; and as to the other two, they were expressly made by Coleman in his own name.

The learned Judge, in allowing a recovery in this action for an amount equal to the \$175 note, has overlooked the fact that that note is still outstanding in the hands of a person other than the present plaintiff, and that there was no value or consideration whatever given to the partnership for that portion of the note.

Then, as respects the first note for \$150, that had been made and discounted three weeks before the note now in question was made, and the money raised on it had been applied in furtherance of the engagement by Coleman to raise all moneys necessary for carrying on the contract in which he was engaged ; and there is no evidence that at the time when Cockburn endorsed that note, he did so on the promise or even with the expectation that the partnership was to be liable to him for it. Consequently before he took a partnership liability for that, he ought to have satisfied himself that Coleman had authority to give it.

Then as to the third note, it was made by Coleman alone, and a considerable portion of the proceeds applied to his own use.

It appears to me that in this case also Cockburn had no right to take the obligation of the partnership for securing him against liability incurred for one of the parties, and at a time when, from the very nature of the transaction, he must have known there was a distinction between Coleman's liability and that of Field and Coleman.

It appears to me therefore that had Cockburn himself been the plaintiff, he could not have recovered on the note

now sued on, and as it was admitted that the plaintiff is bringing this action in trust for him, he can be in no better position.

We express no opinion as to the \$175 note made in the name of Field and Coleman, as that note is not before us.

At the trial the learned counsel for the defendants applied to add a plea setting forth that the plaintiff took the note after it was due and without consideration, and that the payee also received the note without consideration, and transferred it after it was due.

Upon this plea being added a verdict will be entered for the defendant on that plea.

HAGARTY, C. J.—I agree in the result. I wish to add that the conclusion I draw from the evidence is, that there was no authority expressly given by Field to Coleman to use the name of the firm to raise money. On the contrary, I find with the learned Judge, that between them it was agreed that Coleman should raise the money required upon his own credit.

And as to dealings with third persons, I do not think there was any implication of law authorizing one partner in this kind of business to raise money, even for partnership purposes, in the joint name.

It may well be that all goods furnished and work done for carrying on the joint adventure on the order of either partner would create a binding claim on both, or that in most cases of this class a note given expressly for the price of necessary supplies, or for work done, might be recoverable.

I see no reason for extending the doctrine of agency, so as to enable each, without the other's knowledge or assent express or implied, to give notes to raise money to carry on the business.

Therefore, as to this \$500 sued on, McCord, who stands, as is admitted, in Cockburn's place, has not, in my judgment, shewn a right to recover against Field.

GWYNNE, J., concurred.

*Rule absolute.*

## McMARTIN V. MOORE.

*Goods and chattels—Change of possession—C. S. U. C. ch. 45.*

Where goods in a shop or other unoccupied building under lock and key, are sold by the owner, and the key delivered to the purchaser, who goes to the place and examines and checks over the goods, and then locks up the place again :

*Held*, that this will constitute an actual and continued change of possession, so as to satisfy the statute, and the purchaser need not either personally or by some one for him, remain in possession or remove the goods.

## INTERPLEADER issue.

The case was tried before Harrison, C. J., without a jury, at Hamilton, at the Winter Assizes of 1877.

It appeared that one William Perry was the owner of certain goods, consisting of gas fittings and plumbers materials, contained in a store rented by him from the defendant, situate in the town of Dundas.

On the 27th day of April, he made a bill of sale of those now in question, together with others lying at the railway station in bond, for the sum of \$700, which was paid as follows: one note for \$350; another for \$200; \$50 were to remain in plaintiff's hands to meet a claim for rent to that amount; and to the plaintiff the balance, \$100, was to be paid to Perry as soon as the goods were checked over. This bargain was made in Toronto, and Perry delivered the key of the store to the plaintiff.

On the next day the plaintiff wrote to one Stamford, who was his agent at Dundas, as follows: "I have bought Bill's" (meaning W. Perry) "stuff, and send you the key by express. Take charge of this stuff for my account, and when I come up we will make some arrangement for the working of the thing. See Mr. Moore, and tell him if he will take \$465 in the company's note for his claim, I think Perry will give it. Tell him I will arrange any rent Bill owes him when I come, and see what he wants for the store."

*Stamford* was examined as a witness and stated: "I am a gasfitter and plumber. I first found McMartin had pur-

chased the goods upon receipt of a letter enclosing the key. Upon receipt of the letter I went to Mr. Moore's store, where these fittings were kept, and examined them to see that they were the same as at the time of checking. (Witness had previously checked over the goods with the inventory attached). On that day or the next I met William Perry on the street, and took him down to the works, when he told me that he had come from Toronto to deliver over the stuff through the town and at the works, to complete the bargain between Mr. McMartin and himself. I got these goods upon receipt of that letter before seeing Perry. I went to Mr. Moore's store, and read the letter to him, and he read it himself. I was aware there was a balance due for rent, which I offered to pay. Mr. Moore informed me it was all right. We had an account there, and it was all right. The next time I saw Mr. Moore was a few weeks after. He told me then that the goods had been seized. When I went to get the goods, the store was shut and locked. I considered in fact that I had rented the store, Perry having left. He was willing to give me possession as soon as he got rid of Perry. I was to pay \$100 a year for it. I was to take possession as soon as Perry left. No time was fixed upon. I offered to pay him rent owing by Perry, \$50; but he told me he had an account there, and that it would be all right. Upon receipt of the letter I immediately went to the store, and I considered I took possession at that time. I was there for the purpose of seeing if the things were all right, and to take possession. I did this because I considered I would be responsible. I received gas fixtures and tools at the works, and at different places in the town. I kept them in the place I had fitted up for them."

There was no evidence called on the part of the defence.

At the close of the plaintiff's case the defendant's counsel submitted that, upon the evidence, the defendant need not be called on: that the plaintiff had not shewn any claim which would give him any title to the goods which was good as against the execution creditor: that, in the first

place, there was no bill of sale to comply with the Bill of Sale and Mortgage Act: that there was no bill of sale registered, and no actual entry into possession: no sufficient instrument to convey property, and no evidence of change of possession; and further, if the learned Judge was against him on these points, he submitted that the sale was made for the purpose of hindering and defeating the claim of the execution creditor.

The learned Chief Justice found as follows: "I find that the sale from Perry to the plaintiff was one in good faith, and for valuable consideration; but I also find that the sale was not accompanied by the immediate delivery and continued change of possession, and as the bill of sale was not registered, as required by the statute, the sale was void as against the defendant an execution creditor of the bargainor. My verdict therefore is for the defendant, but I reserve leave to the plaintiff to move to enter a verdict for the plaintiff as to the law or any fact of the case mentioned in the issue, if the Court shall be of a different opinion."

In this term, *Browning*, obtained a rule *nisi* under the Law Reform Act, to set aside the verdict entered for the defendant and to enter a verdict for the plaintiff.

In this term, February 16th, 1877, *Osler*, Q. C., shewed cause. No property in the goods ever passed to the plaintiff. The delivery of the key was not of itself sufficient, while the evidence shews that the property was not to pass until the \$100 was paid: *Harris v. Commercial Bank*, 16 U. C. R. 437. There was no actual and continued change of possession so as to take the case out of the statute, and therefore the bill of such should have been registered. There was also a clear case of fraud: *Wilson v. Kerr*, 17 U. C. R. 168; *Heward v. Mitchell*, 10 U. C. R. 535; *Taylor v. Whittemore*, 10 U. C. R. 440; *McLeod v. Hamilton*, 15 U. C. R. 111.

*Browning* and *Monckman*, contra. The property passed to the plaintiff, and there was clear evidence of an actual and continued change of possession. The key of the place in which the goods are, is delivered to the plaintiff and his

agent goes to the place, examines the goods, and then locks them up again. This is sufficient. It is not necessary that he should remain personally in possession or place some one else there : *Middlebrook v. Thompson*, 19 U. C. R. 307 ; *Burton v. Bellhouse*, 20 U. C. R. 60 ; *Richardson v. Gray*, 29 U. C. R. 360 ; *Bank of Upper Canada v. Killaly*, 21 U. C. R. 9 ; *Feehan v. Bank of Toronto*, 10 C. P. 32 ; *Shaw v. Gault*, 10 C. P. 236 ; *Burling v. Patterson*, 9 C. & P. 570 ; *Steel v. Brown*, 1 Taunt. 381 ; *Foster v. Smith*, 13 U. C. R. 243. The sale was *bona fide*, and for valuable consideration, and the learned Chief Justice has so found.

March 9th, 1877. GALT, J.—It is to be observed that no evidence was called by the defendant to rebut the evidence of Stamford, which was therefore uncontradicted.

It appears from the evidence that the goods in question were in a store rented by Perry from the defendant, which store was not occupied by any person otherwise than as a place for keeping the goods. It does not appear whether there was any name over it. Perry sold the goods now in question, (I mean those in the store), to the plaintiff, and handed him the key of the place where they were kept. This key was sent the next day to Stamford with instructions to take possession for him. Stamford immediately went to the defendant and informed him of what had taken place, and read the letter to him. He at the same time offered to pay him whatever amount of rent was then due from Perry, which offer was declined, not because he refused to sanction the arrangement, but because he had an account with the party for whom Stamford was acting, and said it would be all right. Stamford then visited the store, and checked over the goods therein with an inventory, and finding that they corresponded, he locked up the store until he could make arrangements, and before they were completed the goods were seized by the sheriff under an execution against Perry.

From Perry's own evidence, he had nothing to do with the goods after the sale.

With great respect for the opinion expressed by the learned Chief Justice, it appears to me that there was an actual and continued change of possession. The plaintiff, through his agent, did all that he could to take possession, short of actually removing the articles, and notified the landlord that he was to look upon him as the tenant. He also checked over the goods.

In my opinion, therefore, there should be a verdict for the plaintiff, unless the defendant elects to have a new trial to contest the title of the plaintiff on the question of *bona fides*, as that point was not discussed at the trial in consequence of the ruling of the learned Chief Justice on the other branch of the case.

HAGARTY, C. J.—When the question is, whether actual and continued possession has been taken, we must always consider the nature and position of the property. When goods are in a shop or barn or other building under lock and key, and are sold by the owner to another person, and the key delivered to the purchaser, who goes to the place, examines the goods, and locks the place again, I am not prepared to say that he is bound to stay personally in possession, or to place some one to remain, or to remove the goods, at the peril of being defeated under the provisions of the Bills of Sale Act.

In the absence of any evidence to the contrary, I should assume that the purchaser did all the law required him to do.

I have no right to hold that a sale, otherwise sufficient to pass property in a locked store or barn, and when the purchaser takes the key, enters and locks the place again, can be defeated merely by the purchaser not remaining on the premises.

The rule will therefore be absolute to enter a verdict for the plaintiff, unless the defendant elect to have a new trial on payment of costs, so as to let the plaintiff go down to trial at the ensuing Wentworth Assizes.

GYWNNE, J., concurred.

*Rule absolute.*

## PEW V. LAWRENCE.

*Agreement to cut lumber—Property passing—Destruction by fire—  
Appropriation—Delay in accepting.*

By an agreement, dated 17th December, 1876, plaintiff agreed to procure and have sawed for defendant at the Waverley Mill, 18,000 feet of lumber at \$10 per thousand, to be delivered as early in May as possible; defendant agreeing to pay therefor in the manner specified on delivery of the lumber. The lumber was not all cut until the 5th June, and defendant was not aware of its being so cut until after it had been destroyed by fire, which occurred on 12th June, but evidence was given by plaintiff, which defendant denied, that on the 20th May, defendant promised to go up in two weeks and accept the lumber; and it appeared that of the lumber so cut, 9,000 feet was placed in a pile by itself for defendant, but the residue was not separated from other lumber which the plaintiff was getting sawed at the same time.

*Held*, that under the contract no property passed, there having been no delivery or acceptance; and that defendant could not be held liable on the ground of delay in accepting.

THIS was an action brought for not attending to receive delivery of a quantity of lumber got out and sawed for the defendant under a contract, and for not paying in the terms of the contract for lumber alleged to have been delivered to the defendant at the place and in the manner specified in the contract.

The cause was tried before Hagarty, C. J., without a jury, at Barrie at the Fall Assizes of 1876.

From the evidence it appeared that on the 17th of December, 1875, the following agreement was entered into between the parties: "Memorandum of an agreement between Thomas W. Pew of the first part, and William C. Lawrence of the second part. Know all men by these presents that I, Thomas W. Pew, do covenant and agree to take out the following bill of timber for the said W. C. Lawrence, at the rate of ten dollars per thousand, to be delivered to him as early in the month of May, 1876, as it is possible to get it sawed at Waverley Mill." The quantity was stated as 18,000 feet.

The defendant, on the other side of the same sheet of paper, wrote an agreement to pay for the lumber on the terms therein specified, viz.:

"I do covenant and agree to pay to said Pew for getting the annexed bill of lumber \$150 in good farmers' notes; \$30 in good merchantable fruit trees according to order; \$80 in cash, if possible in the month of February, 1876. \* \* The above notes to be paid" [Q. delivered] "to said Pew at the time of delivery of lumber."

The plaintiff got out the logs required for manufacturing the lumber, but, owing to some cause, no portion of the lumber was cut until the 2nd of June.

On the 20th of May, according to the plaintiff's evidence, the defendant came to his house and asked him if he would have the lumber cut in two weeks, and he said he would. "He told me then positively he would be up in two weeks, and would have a settlement." The lumber was cut within the two weeks, but the defendant did not come up before the 12th of June, on which day the lumber was burnt while at the mill. He said further: "The lumber was manufactured at Lodge's mill. I brought in logs that made 40,000 feet. That bill goes to 26,000 or 27,000." (It appeared there was an additional quantity of 8,500 ordered after the first 18,000.) "The rest was for myself. I cannot tell you how much was in the pile by itself, close by the gangway. I should judge there was 31,000 trucked to one side, and piled by itself, about 9,000 close by the mill. I did not put into separate piles what was mine and what was Lawrence's. One pile was altogether his. The 9,000 pile was altogether Lawrence's. The sawyer had piled the lumber up as it came from the mill. There was not room for the whole of it close by the mill. Before Mr. Lawrence could have taken his lumber I would have required to help him to separate it. It took about three days to cut the lumber. It was all cut by the 3rd of June."

Mrs. *Pew* was called to corroborate her husband's statement, that the defendant on the 20th of May promised to come in two weeks to remove the lumber.

The defendant stated that the first intimation which he received that the lumber was cut was in reply to a letter

which he wrote on the 10th of June asking when it would be ready. To which the plaintiff replied on the 14th of June, stating that the lumber had been sawed according to agreement, and had been burned up. He denied that he ever undertook positively to be up in two weeks from the 20th of May. He said, speaking of being at plaintiff's house on the 20th of May. "He" (plaintiff) "said, on the 20th, he could not say when it would be cut, as the mill was out of repair, and he could not tell. He wanted to know when I would be up that way again. I said, if my business would permit, I would be up in two weeks, and I did not agree to be back in two weeks."

The learned Chief Justice entered a verdict for the defendant.

In Michaelmas term, November 20th, 1876, *J. R. Strathy* (of Barrie,) obtained a rule *nisi* under the Law Reform Act to set aside the verdict entered for defendant, and to enter a verdict for the plaintiff.

In this term, February 6th, 1877, *McCarthy*, Q.C., shewed cause. The cases shew that so long as anything remains to be done by either the vendor or purchaser, no property passes. Here there was to be an acceptance. The goods forming part of a larger bulk, it was necessary that there should have been either an appropriation at the time the contract was made, or a subsequent appropriation with the assent of the purchaser, either express or implied. There could be no appropriation at the time of the agreement, for the goods were not then in existence, and there was clearly no subsequent appropriation and assent. The plaintiff never informed defendant of the timber being cut, and defendant was not aware of it until after the fire. The mere delay in going to receive the lumber cannot be deemed to be a waiver of acceptance at all. The evidence shews that the plaintiff never promised to go up : *Jenner v. Smith*, L. R. 4 C. P. 270 ; *Aldridge v. Johnson*, 7 E. & B. 885 ; *Robertson v. Strickland*, 28 U. C. R. 221 : *O'Neil v. McIlmoyle*, 34 U. C. R. 236 ; *Mucklow v. Mangles*, 1

Taunt. 318; *Campbell v. Mersey Docks Co.*, 14 C. B. N. S. 412; *Martineau v. Kitching*, L. R. 7 Q. B. 436. In *Turley v Bates*, 2 H. & C. 200, which will, no doubt, be relied upon by the plaintiff, the goods were in specie at the time the contract was made.

*J. R. Strathy*, (of Barrie,) contra. The contract was to cut the lumber at the Waverley Mill, and there deliver it for defendant within the two weeks, when the defendant was to come up and receive it. As soon therefore, as the lumber was cut and left for the defendant, the contract was complete and the property passed to him, and was at his risk. The defendant, however, by his delay in going up to accept, waived his right to insist upon acceptance; and both the plaintiff and his wife swear that defendant did promise to come up. The law is, that when nothing remains to be done by the seller, but something remains to be done by the purchaser, and he does or omits to do something which is inconsistent with the right to insist on his part not being performed, he loses such right. Then as to appropriation. There was clearly an appropriation of the 9,000 feet. It was placed in a pile by itself, and the plaintiff stated that he intended it for the defendant; and as to the balance, it was different from the other lumber which the plaintiff was cutting, and therefore easily distinguishable and separated. It was clearly the intention of the parties that the property should pass. But even if the property had not passed, if the defendant had assumed the risk of delivery, he is liable on its destruction before delivery: *Rugg v. Minett*, 11 East 210; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Lockhart v. Pannell*, 22 C. P. 597; *Rhode v. Thwaites*, 6 B. & C. 688. The case of *Turley v. Bates*, 2 H. & C. 200 is strongly in favour of the plaintiff, and the fact of the goods being in specie did not affect the judgment.

March 9th, 1877. GALT, J.—The only point relied on by Mr. *Strathy* was that in consequence of the defendant having, on the 20th of May, promised to come and receive the

lumber in two weeks, and the lumber being ready for him, he was liable for the loss which took place a few days after, although he had received no notice that the lumber was ready.

To this there are two answers made by defendant. 1. That he did not promise to come at the time specified. 2. That, at the time of the fire, the lumber was the property of the plaintiff, and not of the defendant; there having been no appropriation of any specific lumber by the plaintiff and acceptance by defendant.

It is very clear from the evidence that there was no default on the defendant's part in the first instance. The default, if any, was on that of the plaintiff. It is equally plain, that as regards the greater portion of the lumber there had not been any appropriation, even by the plaintiff, and that as respects the defendant there could not have been any assent to any appropriation, for the reason that he was not aware that the lumber had been cut before he learned it had been destroyed.

In *Mucklow v. Mangles*, 1 Taunt. 318, which was an action arising out of a contract to build a barge, Lawrence, J., says, at p. 320: "No property vests till the thing is finished and delivered."

In *Campbell v. Mersey Docks*, 14 C. B. N. S. 412, Erle, C. J., says, at p. 414: "It has been established by a long series of cases—of which it will be enough to refer to *Hanson v. Meyer*, 6 East 614; *Rugg v. Minett*, 11 East 210; and *Rhode v. Thwaites*, 6 B. & C. 688—that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to both by vendor and vendee. Nothing passes until there is an assent, express or implied, on the part of the vendee."

In *Aldridge v. Johnson*, 7 E. & B. 885, Lord Campbell says, at p. 898: "No rule of the law of vendor and purchaser is more clear than this: that, until the appropriation and separation of a particular quantity, or signification of

assent to the particular quantity, the property is not transferred."

See also *Gilmour v. Supple*, 11 Moore P. C. 551.

At the time when the agreement in December was made, the lumber in question had not been sawed, consequently there was no property which could pass to the defendant, and after the stuff had been cut it was destroyed before the defendant had heard of its manufacture, so that there never was and could not have been any acceptance by the defendant of any portion.

Mr. Strathy, however, contended that, because there was a pile containing about 9,000 feet, which the plaintiff stated had been cut for the defendant and was in a pile by itself, there was a sufficient appropriation to pass the property in that quantity to the defendant. But as the defendant had not accepted it, and, moreover, as he was not bound to accept it until after examination, I am clearly of opinion that no property passed to him.

Mr. Strathy lastly urged that the plaintiff was entitled to nominal damages, because the defendant had not come up within two weeks from the 20th of May to receive the lumber.

The evidence does not satisfy me that he ever made any such absolute promise. I think the defendant's account of what took place on the 20th of May is the more probable statement. He says: "He wanted to know when I would be up that way again. I said, if my business would permit, I would be up in two weeks. I told him to drop a card to Guelph; if he would drop me a card that the lumber was ready, I would come up; and I asked him to send a card to Barrie, and one to Guelph."

Moreover the evidence does not shew that if the defendant had come in two weeks from the 20th of May he could have got the lumber; for, according to the evidence of the person who cut the lumber, it was not cut until after the two weeks had expired. He says: "I was sawyer at Waverley Mill. I remember cutting lumber for Mr.

Pew from the 2nd to the 5th of June. We were going all the three days. I did not measure the lumber.

I am therefore of opinion that this claim also fails.

HAGARTY, C. J.—The law is thus stated in *Benjamin on Sales*, 2nd ed., 583. “Even where the property has not passed, and the price is to become payable only on delivery, yet if the buyer has assented to assume the risk of delivery, he must pay the price if the goods are destroyed before delivery.”

See on this *Castle v. Playford*, L. R. 7 Ex. 98, reversing L. R. 5 Ex. 165, and cases there cited.

*Martineau v. Kitching*, L. R. 7 Q. B. 436, has a very full discussion of all the law bearing on the present case. The property was, as here, destroyed by fire. It was held that by the terms of the contract it was at the purchaser's risk.

Blackburn, J., at p. 456 : says, “By the civil law it always was considered that, if there was any weighing, or anything of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being *in morâ*, and it was his default, though the *emptio* is not *perfecta*, yet if it is clearly shewn that the party was *in morâ*, he shall have the risk, just as if the *emptio* was *perfecta*. That is perfectly good sense and justice, though it is not necessary to the decision of the present case, that, when the weighing is delayed in consequence of the interference of the buyer, so that the property did not pass even if there were no express stipulation about risk, yet because the non-completion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed.”

Lush, J., says, at p. 459 : “Where goods are sold and there is no express stipulation in the contract to the contrary, in order to determine at whose risk the goods were at any given time, you have to ascertain in whom the property was vested at that time ; and it is quite settled

by the cases that this is a question of intention to be collected from the terms of the contract. \* \* I agree that the question is not in whom the property was, but at whose risk the goods were, and I collect clearly from the terms of contract that it was agreed between the parties that after the expiration of two months the goods were to be at the risk of the buyer."

It must be borne in mind that in these cases the goods which were the subject matter of the contract were in existence.

In the case for judgment the contract was for the manufacture and production of goods, and it seems impossible to find that there could be any intention in the parties that the property should pass. Nor, on the other hand, that it could be at the risk of the bargainee from any named time.

On the evidence I think we must clearly find that this lumber had never been either delivered or accepted, and that up to its destruction by fire it remained the property of the plaintiff, and that the defendant never placed himself by his default in the position spoken of by Blackburn, J., of being *in mora*, and so chargeable with the loss as if the *emptio* were *perfecta*.

GWYNNE, J., concurred.

*Rule discharged.*

# SINCLAIR V. THE OTTAWA IRON AND STEEL MANUFACTURING COMPANY.

*Advertisements—Right to continue—Amount of charges.*

S. & C., the proprietors of a weekly newspaper, seeing in another paper an advertisement of defendants' company inviting subscriptions for stock, and stating that the share lists would close on the 10th December, 1874, on the 3rd November, telegraphed H., the defendants' managing director, to ask if they might insert it in their paper, to which H. replied, "Yes. In the mean time send terms, must be low." The advertisement accordingly appeared in the paper on the 5th November, and was continued till 21st January, 1875, with an alteration made on the 26th November by B., defendants' agent at Toronto, being 12 insertions, for which plaintiff claimed at the rate of 10 cents per line, or \$32 for each insertion. On the 10th December, S. & C. drew on defendants for \$160, the sum then due at that rate, at 30 days, which was paid; and this action was brought to recover the balance \$224. There was no express contract to pay at such rate, but S. said that in answer to H.'s telegram, he wrote to him, that their charge was 10 cents a line; and a notice to that effect also appeared in the paper. H. denied the receipt of the letter. In action by plaintiff as assignee of S. & C.

*Held*, GALT, J., dissenting, that the plaintiff could not recover, for that, even if the whole 12 insertions were allowed, the amount paid was, upon the evidence set out in the case, a fair remuneration therefor.

Per GALT, J., the plaintiff was entitled to recover \$32, for one more insertion, for although the advertisement shewed that it should not have been continued after the 10th December, yet the dealings between the parties precluded defendants from questioning the rate of charges.

THIS was an action brought by the plaintiff, as assignee of Thompson & Smallpiece, proprietors of the *National* newspaper, for certain charges, alleged to be due for publishing an advertisement of the defendants.

The cause was tried before Wilson J., without a jury, at Toronto, at the Winter Assizes of 1877.

The advertisement appeared originally in a newspaper, published at Ottawa, on the 2nd of November. No instructions had been sent to the publishers of the *National* to copy it, but one of them, seeing the advertisement, telegraphed, on the 3rd of November, to Haycock, the managing director of the defendants, as follows: "May we copy from *Times* of November 2nd advertisement of iron and steel manufacturing company, &c." To which Haycock replied on the same day, "Yes. In the meantime send

terms: must be low." The advertisement accordingly appeared in the *National* of the 5th November and was continued to January 21st, 12 insertions, for which the sum of \$32 each was charged, amounting to \$384; on account of which Thompson & Smallpiece drew on the defendants on the 10th of December at 30 days, for \$160, which was duly paid, and this action was brought for the balance.

*Smallpiece*, one of the proprietors, stated, that he wrote in reply that their terms were 10 cents a line. It was, however, stated by Haycock that he had no recollection of having received such a letter.

There was a good deal of discussion at the trial as to whether any personal communication had taken place between Haycock and Smallpiece before the first publication, Haycock asserting that there was, and that at the time when he authorized the publication he expressly limited the time to one month. This was denied by Smallpiece, and the evidence seemed to conclusively shew that Mr. Haycock was mistaken. This also was the opinion formed by the learned Judge.

On the 26th of November Haycock came to Toronto, and arranged with one Buchan to act as agent for the company in soliciting subscriptions for stock.

A letter was put in, written by him on that day, to Mr. Buchan, in which he said: "You will please cover the ground from Toronto west, your commission will be  $3\frac{1}{2}$  per cent on allotments. These allotments will take place on the 15th of December, so you can draw on us, say at 10 day's sight, on that day. You will please sign the application on the back, so as to insure commission. Advertising will be paid by the company by draft at 30 days after completing of allotment."

On the same day Smallpiece, under instructions from Haycock, called on Buchan, from whom he received the following instructions: "Referring to the instructions of Mr. Haycock with regard to the advertisement of the Ottawa Iron and Steel Manufacturing Co., please alter the last paragraph after the words head office 'or at the office

of Lawrence Buchan, stock broker, 22 King street east, Toronto, where subscriptions to the stock of the company may be made.’”

It was proved that the letters t. f., at the foot of an advertisement, meant that it was to be continued “till forbid.” These letters appeared at the foot of the advertisement in *The National*; but not in the paper from which it was copied. Besides this, there was nothing which in itself appeared to authorize the continued insertion after the object for which it had been published was satisfied.

The advertisement was issued for the purpose of calling attention to the company, and inviting subscriptions for stock. It stated, “The share lists will close on the 10th of December, 1874, and as the shares will be allotted *pro rata* according to priority, an early application is desirable.”

The learned Judge found that the plaintiff’s charges were excessive, and that the \$160 paid was sufficient to cover their claim; and he entered a verdict for the defendants.

In this term, February 8th, 1877, *A. Galt* obtained a rule *nisi* under the Law Reform Act to set aside the verdict entered for the defendants, and to enter a verdict for the plaintiffs.

During the same term, February 15th, 1877, *Osler* shewed cause. There is no evidence of any liability imposed on the company. The mere fact of Haycock being managing director does not of itself confer any authority to insert advertisements, and something more than Haycock’s own statement is necessary. The plaintiff should have produced the defendants’ Act of incorporation, and shewn what were the powers of the directors, and of the managing director; at all events, authority from the directors should have been proved. The inference is, that it was done no Haycock’s own authority, and for his own benefit: *Michie v. Huron and Erie R. W. Co.*, 26 C. P. 566; *Wood v. Ontario and Quebec R. W. Co.*, 24 C. P. 334; *O’Brien v. Credit Valley R. W. Co.*, 25 C. P. 283; *Taylor v. Cobourg and Marmora R. W. Co.*, 24 C. P. 200. Assuming, how-

ver, that Haycock had power to bind the company, then, as found by the learned Judge, the amount paid is sufficient.

*McMichael, Q. C., and A. Galt, contra.* There was clearly evidence of authority on the part of Haycock to bind the company. Haycock himself stated that he had authority, and there is no evidence to the contrary. Then as to the amount of the charge. The amount charged for each insertion is correct. The defendants are informed, in reply to their request as to the charge, that it is ten cents a line; but even if, as stated by Haycock, this letter never was received, the paper sent him with the advertisement inserted, shewed that ten cents was the charge. The fact also of their paying the draft based on this charge, is evidence of an admission on their part of its correctness. Then as to the number of insertions. There is no express limit, and it is proved that the practice in such cases is to insert till forbid; and the paper sent to defendants contained the words "t. f.," which was proved to mean "till forbid." Assuming, that the time was, limited to a month, or until the object of the advertisement was completed, namely, 10th December, then the plaintiff is entitled to all the advertisements up to and including that day, namely, for six insertions; and as the draft only included five, he is entitled to the sixth, and therefore, at all events, should have a verdict for \$32.

March 9th, 1877. GALT, J.—It appears to me plain from the evidence that it was the wish and intention of Mr. Haycock that the advertisement should be continued, and that when he thought he had given positive instructions that it was to be continued only for a month he was mistaken.

The question still remains to be considered whether there was anything in the advertisement itself which, in the absence of any instructions, would shew that it was not intended to be continued beyond the 10th of December.

I concur with the learned Judge in the opinion which he expressed on this point. He says: "I find, however,

as a fact, that the agreement was that the publication should be for more than a single insertion, in which case there is no limit to it by any positive agreement. But the purpose was to get the stock taken up; when that was done, the further publication was useless, and I am of opinion the notice does contain within itself a sufficient intimation to the publisher at what time the advertisement should be discontinued, and that is by the 10th December, 1874, unless he receive a further authority to continue it. I shall allow the plaintiff therefore for a publication to and including December 10th, 1874. In that way there will be six insertions or publications." These six insertions, to which the plaintiff's claim should be limited, would at \$32 each amount to the sum of \$192. The learned Judge was however of opinion that the charge was excessive, and as the printers had already received \$160, he found a verdict for the defendants.

Without at all questioning the propriety of the finding of the learned Judge on this latter point, I doubt whether we are at liberty, considering the dealings which took place between the parties, to treat this claim as one entirely resting on what a jury might allow as a fair compensation in the absence of any special agreement.

Mr. Smallpiece swore distinctly that in reply to the telegram directing him to "send terms," he wrote that their charge was ten cents a line. He further stated that the rates were published in the paper, and we find that above the leading article of the paper, the following notice is inserted: "Advertisements for a less period than three months, ten cents per line of nonpareil each insertion. Contract rates made known on application at the publication offices." No application was ever made on the subject, and I hardly see that we are justified in over-ruling the express notice of charges, in the absence of any evidence of an agreement for a lesser rate. Moreover, it was proved that, on 3rd December, after five insertions, a draft was drawn on the defendants for \$160, being the charge then due at the rate of \$32 for each publication, and no

objection was made to the draft on that account, but because it was drawn at ten days in place of thirty. Another draft was then drawn on 10th December, at thirty days, which was paid, and, so far as the evidence shews, without question.

Under these circumstances, I am of opinion that the defendants are precluded from questioning the amount due for the five insertions, and therefore that the plaintiff is entitled to be paid for the sixth, which was undoubtedly authorized by the instructions received from Mr. Buchan when the advertisement was altered. I am therefore of opinion that a verdict should be entered for the plaintiff for \$32, with a certificate for County Court costs.

HAGARTY, C. J.—I am of opinion that on the plea of payment, the verdict should stand for the defendants.

I am to draw conclusions of fact in this case, and I am satisfied, on the evidence, that we cannot imply any contract to pay at the rate of ten cents a line, or \$32 for each insertion in a weekly paper.

In the absence of express contract, we must consider, as I think a jury would, what would be a reasonable charge.

My brother Wilson considered it proved that Haycock, in agreeing to the request to be allowed to insert the advertisement, said the charges must be low, and he does not believe that Haycock ever received an answer, said to have been sent, that the charge would be ten cents a line.

I see no reason to dissent from his view on this point.

Guided by the charges of other papers, the learned Judge considered seven cents a line sufficient, at which rate, reducing the lines to their proper numbers, six insertions would only be \$117.

These six insertions would be, five said to be included (at \$32 each, as plaintiff claims) in the \$160 draft, drawn on 10th December, and one more for the advertisement appearing on that day—six in all.

It appears there were twelve in all up to 24th January.

Even if the whole twelve insertions be allowed, I am of

opinion that the \$160 paid would be a fair remuneration, judging from the charges of other journals.

For instance, the *Montreal Gazette*, for daily insertions for one month, charged \$180.20. Five other journals, for the same term, at lesser rates.

This would be, say for twenty-six insertions, not over \$7 each insertion.

The \$160 paid here would give over \$13 each for twelve insertions.

It is urged that the payment of the draft amounted in law to a recognition of the proper amount due up to that time for five insertions. But this is open to explanation. When Haycock paid a draft, dated 10th December, he might naturally suppose that this was the end of his dealing with the paper, and a payment for the sake of peace ought not to preclude us from considering the whole merits.

Unless bound by some inflexible rule to hold that the charge of ten cents a line was the contract, we ought not, I think, to sanction this claim, which certainly does not present a very reasonable appearance.

The conclusion I draw from the facts is in favour of defendants, and I would have so found if on a jury.

As a Judge, I see no legal objection to such a verdict.

The result is most unfortunate to the present plaintiff the assignee of this claim. The case has unfortunately been entered for trial at three Courts of Assize.

GWYNNE, J., concurred with HAGARTY, C. J.

*Rule discharged.*

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## FOWLER V. VAIL.

*Foreign judgment—Debt—Assignment of—*35 Vic. ch. 12, O.—*Pleading—*23 Vic. ch. 24, sec. 1, 39 Vic. ch. 7, O., 31 Vic. ch. 1, secs. 33-5, O.

*Held* that a foreign judgment is *prima facie* a debt, and conclusive on its merits, and as such is assignable under 35 Vic. ch. 12, O., so as to enable the assignee to sue thereon in his own name.

To an action on a foreign judgment, commenced previous to the repeal by 39 Vic. ch. 7, O. of 23 Vic. ch. 24, sec 1, which allowed the defendant to set up to the action on the judgment any defence which was or might have been set up to the original suit, the defendant, after the passing of the repealing Act, pleaded several pleas setting up such defences.

*Held*, that they could not be pleaded, for that by 39 Vic. ch. 7, O., the right to so plead was absolutely taken away, and was not preserved by secs. 33-5 of the Interpretation Act 31 Vic. ch. 1, O.

*Held* also, that one of such pleas, setting up the Statute of Limitations as a bar to the cause of action on which the judgment was recovered, was also bad, in not stating that it was the period of limitation according to the foreign law.

A further plea to the judgment averred that the defendant was not at the commencement of the action, nor down to the judgment, resident or domiciled in, or a subject of the foreign country, and was never served with any process, summons, or complaint, nor did he appear to the action, or before the recovery of judgment, have any notice or knowledge of any process or proceedings in the action, nor any opportunity of defending himself therein.

*Held*, plea good; but another plea omitting the averment of defendant being a citizen or subject of the foreign country, was held bad.

DECLARATION: That on the 18th March, 1872, in the State of New York, one of the United States of America, in a suit depending between Maria P. Beecher, administratrix of the goods, chattels, and effects of William A. Beecher, deceased, and the defendant, in the Supreme Court for the State of New York, being a Court of the said State duly holden and having jurisdiction in that behalf, the said Maria P. Beecher recovered against the defendant by the judgment of said Court, and according to the laws of said State, the sum of \$2,895.60, and also \$57.70, for costs and disbursements, amounting in all to \$2,953.30, which is equivalent in lawful money of Canada to \$2,953.30, and which the said defendant was by the said Court adjudged and ordered to pay to the said Maria P. Beecher, and the said judgment is still in force and unsatisfied. And after-

wards, and before the commencement of this suit, to wit, on the 25th June, 1872, the said Maria P. Beecher did, by deed poll, dated on that day, assign and transfer to the plaintiff the said judgment, the moneys and interest thereby secured, and all moneys, benefit, and advantage to be had or received or derived therefrom.

Second plea: that the said Maria P. Beecher never was, nor is she, administratrix of the goods and chattels and effects of William A. Beecher, as alleged.

Fourth plea: that the alleged judgment in the declaration mentioned was recovered in an action brought by the said Maria P. Beecher, as such administratrix, against the defendant upon a judgment of the Supreme Court of the city of New York, recovered by William A. Beecher against the defendant; and that the cause of action of the said Maria P. Beecher did not accrue within twenty years before the commencement of her suit.

Fifth plea: that the alleged judgment was recovered as in the last plea mentioned, and that the defendant satisfied and discharged by payment the judgment so recovered, &c., and all claims and cause of action of the said Maria P. Beecher against him upon or in respect thereof, before the commencement of the action against him in which the judgment upon which this action is brought was recovered.

Sixth plea: that the alleged judgment was recovered as in the last plea mentioned, and that before the commencement of the action against him in which the judgment upon which this action is brought was recovered, and during the lifetime of the said William A. Beecher, the claim of the said William A. Beecher was satisfied and discharged by Albert Salter paying to the said William A. Beecher, at the defendant's request, out of the proper moneys of the said Albert Salter, a sum of money which, by agreement between him and the said William A. Beecher and the defendant, the said Albert Salter so paid and the said William A. Beecher accepted and received in satisfaction and discharge of the said judgment so recovered

against the defendant by the said William A. Beecher, as in the fourth plea mentioned, and of all claim upon or in respect thereof.

Eighth plea : that the action upon which the said judgment was recovered in the Supreme Court for the State of New York, was commenced according to the laws then and still in force in the State of New York, by summons and complaint, and that the defendant was not at the time of the commencement of such action, or at any time previous to the recovery of the said judgment, resident or domiciled within the jurisdiction of the said Supreme Court, or within the jurisdiction of the United States of America, or a subject of the United States of America, and the defendant was not, at any time before the recovery of the judgment, served with any process or summons or complaint in the action, nor did the defendant appear in the action, nor had he, before the recovery of the judgment, any notice or knowledge of any process, summons, or complaint, or any proceedings in the action, or any opportunity of defending himself therein.

Ninth plea : that the action upon which the said alleged judgment was recovered in the Supreme Court for the State of New York was commenced according to the laws then and still in force in the said State of New York, by summons and complaint, and that the defendant was not at the time of the commencement of such action or at any time thenceforward, previous to the recovery of the said judgment, resident or domiciled within the jurisdiction of the said Supreme Court, or within the jurisdiction of the United States of America ; and that the defendant was not at any time before the recovery of the said alleged judgment, served with any process or summons or complaint in such action, as required by the laws then in force in the said State of New York, nor had he before the recovery of such judgment any notice or knowledge of any process, summons or complaint, or any proceedings in such action, or opportunity of defending himself therein.

The defendant also demurred to the declaration, on the

grounds ; that the declaration does not disclose any cause of action in the plaintiff in respect of the judgment recovered by Maria P. Beecher against the defendant : that the said judgment is not assignable at law, so as to entitle the plaintiff to sue the defendant thereon in his own name : that it is not shewn that the same is a debt or chose in action arising out of contract, or that the said judgment was recovered upon or in respect of a debt or chose in action arising out of contract.

The plaintiff also demurred to the pleas, on the grounds :

To the second, fourth, fifth, and sixth pleas : that the defence thereby set up, if it existed, should have been set up in the action in which the judgment declared on was recovered, and not afterwards.

The following additional grounds were also taken to the fourth plea : that it is not therein shewn that by the laws of the State of New York the lapse of twenty years was a bar to that action ; and that the matter therein pleaded is merely a matter of procedure over which the said Supreme Court had full control.

To the eighth and ninth pleas: that it is not therein shewn that the judgment therein mentioned was recovered contrary to natural justice ; nor does it therein appear but that the said judgment was recovered on a former judgment recovered in an action in which the defendant had due notice and full opportunity for defence (as the fact was), nor but that the plaintiff before and at the time of the recovery of the said judgment was a subject of the United States, and liable by their laws to be proceeded against and have judgment against him, without service on him of any summons, complaint, or proceeding in the action.

On the 12th of January, 1877, the demurrer came on for argument, when it was, by the consent of the parties, directed to be argued before the full Court.

In this term, February 16th, 1877, the demurrer was argued.

*Ferguson*, Q. C., for the defendant. A foreign judgment is not a debt or chose in action. It is not conclusive on the merits. It is therefore not assignable under the Act 35 Vic. ch. 12, so as to enable the plaintiff to sue thereon in his own name: *B. & L. Præc.*, 2nd ed., 167; *Bank of Australasia v. Harding*, 9 C. B. 661; *Godard v. Gray*, L. R. 6 Q. B. 139; *Wellington v. Chard*, 22 C. P. 518; *Cole v. Bank of Montreal*, 39 U. C. R. 54. The judgment having been recovered and the action commenced prior to the repeal of 23 Vic. ch. 24, sec. 1, by the defendant, under the Interpretation Act, 31 Vic. ch. 1, sec. 6, subsecs. 33, 35, is entitled to plead, under that Act, all the defences available in the action in which the judgment was recovered. The 2nd, 4th, 5th, and 6th pleas are therefore good. The further objection to the fourth plea cannot prevail, as it is assumed until the contrary appear that the law of the foreign country is the same as ours, and the plaintiff should have replied stating that it was different. The 8th plea is clearly good, and the 9th is the same, with the exception that it omits the statement of the words that defendant was not a subject of the foreign country; but the plea shews that the recovery on the foreign judgment was contrary to the policy of the law and to natural justice: *Westlake* on Int. Law, 2nd ed., 1859, secs. 393, 412-13; *London and North Western R. W. Co. v. Lindsay*, 3 McQ. H. L. 99; *Smith v. Gould*, 4 Moore P. C. 21; *Shibsby v. Westenholz*, L. R. 6 Q. B. 155; *Copin v. Adamson*, L. R. 9 Ex. 345; *Roscoe*, N. P., 13th ed., 222-3.

*J. K. Kerr*, Q. C., contra. The declaration is good. The foreign judgment is conclusive on the merits; and it is therefore a debt or chose in action assignable within the meaning of the statute 35 Vic. ch. 12, O., so as to enable the assignee to sue in his own name: *Chitty* on Contracts, 8th ed., 723-4; *Chitty* on Pleading, 3rd ed., vol. i, 181; *Add. on Contracts*, 7th ed., 291, 1055; *Godard v. Gray*, L. R. 6 Q. B. 139; *Williams v. Jones*, 13 M. & W. 628, 633; *Phillpott v. Adams*, 7 H. & N. 888; *Sadler v. Robins*, 1 Camp. 253; *Phillimore's* Int. Law, 2nd ed., vol. iv., 735; *Ricardo*

v. *Garcias*, 12 Cl. & F. 368; *Story* on Conflict of Law, 7th ed., sec. 618; *Cole v. Bank of Montreal*, 39 U. C. R. 54, 60; *Warrener v. Kingsmill*, 8 U. C. R. 407, 13 U. C. R. 18; *Duchess of Kingston's case*, Sm. L. C., 7th ed., 726, 813; *Waydell v. Provincial Ins. Co.*, 21 U. C. R. 618. Then as to the pleas. The 2nd, 4th, 5th, and 6th pleas are bad, as by the repeal of 23 Vic. ch. 24, sec. 1, by 39 Vic. ch. 7, O., the right to plead these defences is taken away, and, the Interpretation Act 31 Vic. ch. 1, secs. 33-5, does not apply: *Grantham v. Powell*, 10 U. C. R. 306; *Calcutt v. Ruttan*, 13 U. C. R. 147. The 4th plea is also bad, as it does not state that this is the statutory period according to the law of New York. The cases shew that the 8th and 9th pleas are bad; at all events the 9th is, in not stating that the defendant was not a subject of the State of New York: *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; *Copin v. Adamson*, L. R. 9 Ex. 345.

March 9th, 1877. GWYNNE, J.—What judgment should be given upon the demurrers to the second, fourth, fifth, and sixth pleas pleaded in this case, depends upon the point, whether or not the defendant can plead to this action the same pleas as he could have pleaded under 23 Vic. ch. 24 sec. 1, prior to the passing of 39 Vic. ch. 7, O., this action having been commenced on the 9th of January, 1873, and the declaration filed on the 19th of February, 1873, and the pleas not having been filed until after the passing of the Ontario Statute 39 Vic. ch. 7, whereby the first section of 23 Vic. ch. 24 is repealed.

This point depends upon the construction to be put upon the Ontario Interpretation Act, 31 Vic. ch. 1; for the repealing statute itself contains no proviso or exception whatever, but repeals in absolute terms the 1st section of 23 Vic. ch. 24.

By the Interpretation Act it is enacted, in section 6, subsection 33, that where any Act is repealed wholly or in part, and other provisions substituted, all officers, persons,

bodies politic or corporate, acting under the old law, shall continue to act, as if appointed under the new law, until others are appointed in their stead; and all proceedings taken under the old law shall be taken up and continued under the new law, when not inconsistent therewith, and all penalties and forfeitures may be recovered, and all proceedings had in relation to matters which have happened before the repeal, in the same manner as if the law were still in force, pursuing the new provisions as far as they can be adapted to the old law.

And in sub-sec 34 it is enacted that the repeal of an Act at any time shall not affect any act done or any right or right of action existing, accruing, accrued, or established, or any proceedings commenced in a civil cause, before the time when such repeal shall take effect; but the proceedings, in such case shall be conformable, when necessary, to the repealing Act.

And by sub-sec 35 it is enacted that no offence committed, and no penalty or forfeiture incurred, and no proceeding pending under any Act at any time repealed, shall be affected by the repeal, except that the proceedings shall be conformable, when necessary, to the Repealing Act; and that where any penalty, forfeiture, or punishment shall have been mitigated by any of the provisions of the Repealing Act, such provisions shall be extended and applied to any judgment to be pronounced after such repeal."

These are the only sections applicable, and we are of opinion that none of them extend to continuing to a defendant who had not pleaded to an action already commenced, the right to plead, under 23 Vic. ch. 24 sec. 1, after the passing of 39 Vic ch. 7, the same defences he might have pleaded before the passing of the latter Act.

The bringing of the action by the plaintiff against the defendant was not an act done or a proceeding commenced *under* the repealed law. And it is, we think, acts done, and *rights* existing, accruing, accrued, or established, under the repealed law, which these sections relate to. They do not relate to a provision of law as to the nature or num-

ber of the pleas which might be pleaded in defence of an action, which is a provision relating to procedure only ; and until plea pleaded there cannot be said to be anything done or proceeding taken *under* the repealed Act. The 34th sub-section, which preserves unaffected any proceedings *commenced* in a civil cause before the time when such repeal shall take effect, relates to the institution of an action, and the sub-section provides that the subsequent proceedings shall be conformable, when necessary, to the repealing Act.

There is no part of the above section at all applicable to the case before us, unless it be the word "right" in the 34th sub-section.

Now reading the 34th sub-section as declaring "that the repeal of an Act at any time shall not affect any *right* existing, accruing, accrued, or established," we do not think that these words can be construed to apply to a provision of law enabling a defendant to plead double, for example, on any particular species of defence, which, but for such provision of law, he could not plead to an action. The word "right," in that sub-section, by its context, "or right of action, existing, accruing, accrued, or established, or any proceedings commenced in a civil cause," means, we think, "a right to something capable of being enforced by action, and not the procedure by way of defence to an action."

If the pleas had been pleaded under 23 Vic. ch. 24 sec. 1, before the passing of 39 Vic. ch. 7, doubtless the case would have had to proceed to judgment as before upon those pleas ; but no pleas having been pleaded, there was nothing done under the old law which appears to be necessary to be preserved after the passing of the repealing statute.

The proceedings in this case, whatever they may be, subsequent to the passing of the repealing Act, and included in such proceedings that of pleading, must, as it appears to me, be conformable to the repealing Act, which in absolute *present* terms takes away the right of pleading, which sec. 1 of 23 Vic. ch. 24, sanctioned.

The defendant both demurs and pleads to the declaration. The point of demurrer is, that, as is contended, a foreign judgment, upon which the action is brought in the name of the assignee of it, is not a debt or chose in action arising out of contract, within the meaning of the old statute 35 Vic. ch. 12.

Upon this demurrer, we are of opinion that judgment must be for the plaintiff.

The law, as laid down by Parke, B., in *Williams v. Jones*, 13 M. & W. 628, at p. 633, and confirmed by *Godard v. Gray*, L. R. 6 Q. B., 139, at p. 148, must govern this case, namely, "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment, may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced."

Upon this passage from the judgment of Parke, B., in *Williams v. Jones*, Blackburn, J., in *Godard v. Gray*, at p. 148, says: "Taking this as the principle, it seems to follow that anything which negatives the existence of the legal obligation, or excuses the defendant from the nonperformance of it, must form a good defence to the action."

And, referring to the language of Lord Brougham, in *Houlditch v. Donegall*, 2 Cl. & F. at p. 477, speaking of a foreign judgment as only evidence, and that *primâ facie* only, of a debt, he says: "It is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only *evidence*. If that were so," he says, "every count on a foreign judgment must be demurrable on that ground. The mode of pleading shews that the judgment was considered, not as merely *primâ facie* evidence of that cause of action for which the judgment was given, but as, in itself, giving rise, at least *primâ facie*, to a legal obligation to obey that judgment and pay the sum adjudged. For if the judgment were merely considered as evidence of the original cause of action, it must

be open to meet it by any counter evidence negating the existence of that original cause of action."

Upon the authority then of *Godard v. Gray*, L. R. 6 Q. B. 139; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Bank of Australasia v. Harding*, 9 C. B. 661; and *De Cosse Brissac v. Rathbone*, 6 H. & N. 301, a foreign judgment involves *primâ facie* a legal obligation to pay the sum adjudicated in the nature of and recoverable as a debt, and which cannot be contested on the merits; we must hold it to be a debt assignable within the meaning of the statute, 35 Vic. ch. 12.

While the Act 23 Vic. ch. 24 sec. 1, remained in force it was, it is true, capable of being opened upon the merits, but that made it no less *primâ facie* a legal obligation of the nature of a debt, and so assignable at law under our statute.

Judgment must also be for the plaintiff upon the demurrers to the second, fourth, fifth, and sixth pleas, for the reason that, as we think, it is not now open to the defendant to plead under the provisions of the repealed first section of 23 Vic. ch. 24.

Judgment will be for the defendant upon the demurrer to the eighth plea, upon the authority of *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, and *Copin v. Adamson*, L. R. 9 Ex. 345, and other cases.

We think the ninth plea bad, for not averring that the defendant was not a subject of the foreign country in which the judgment, upon which the present action is brought, was recovered, nor amenable to its jurisdiction, although absent from it, for if he was, then, upon the authority of *Schibsby v. Westenholz*, the judgment recovered will be binding upon him.

Judgment therefore will be for the plaintiff upon the demurrer to the ninth plea.

HAGARTY, C. J.—I agree with the result arrived at by my brother Gwynne.

I think a foreign judgment is clearly assignable under the Ontario Act.

The fourth plea, as to a statutory bar existing under our law, and which we are asked to assume does exist in the foreign country, I think would have been a bad plea, even with the power of pleading at large which prevailed here to a late period. Without an averment of what the foreign law of limitation was, such a plea could never have been supported.

The eighth plea raises the question so often and so keenly contested both here and in England.

I think the case cited of *Schibsby v. Westenholz*, L. R. 6 Q. B. 155 is decisive of the principle on which we should act.

The judgment of Blackburn, J., places the matter on a reasonable footing.

I think we should decide that a plea averring that the defendant was not, at the commencement of the action nor down to judgment, resident or domiciled in or a subject of the foreign country, nor was ever served with any process, summons, or complaint, nor did he appear to the action, or before the recovery of judgment have any notice or knowledge of any process, &c., or proceedings in the action, nor any opportunity of defending himself therein, is and ought to be a good and sufficient answer.

As to the ninth plea, it differs from the eighth in the absence of any averment that he was not a citizen or subject of the foreign country.

If this were *res integra*, I think I should hold the plea sufficient *primâ facie* to put the plaintiff on a replication shewing how the judgment had been properly recovered against the defendant.

But I think the authorities are to the effect that the plea is insufficient. It states that the suit was commenced by summons and complaint, and that he never was served with any process or summons or complaint as required by the laws then in force, nor had he notice or knowledge, &c.

For all that is alleged, the process may have been served, not personally, but by advertising or posting up in some place, or by service on some agent or at some last place of

residence, or in some other way allowed by the local law, and yet the defendant may still with truth aver as in his plea that he was not served and had no knowledge.

There is a very full discussion of the law in *Maubourquet v. Wyse*, Ir. R. 1 C. L. 471 at p. 485, 1868, besides the later decision in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155 already cited.

GALT, J., concurred.

*Judgment accordingly.*

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### KEITH V. McMURRAY.

*Vessel—Trover—Conversion—Statute of Limitations.*

About 1857, the plaintiff purchased from the owner of a certain steamer the copper sheeting, &c., thereon, it being understood that he was to get it when a suitable time arrived, as by dry-docking or hauling out the vessel. The yacht club soon after bought the hull, which they used as a club ship, having the same understanding with the plaintiff. Shortly afterwards the plaintiff with the consent of the club took off the sheeting to the waterline, when the club, thinking that the vessel was being injured, but without disputing the plaintiff's ownership, refused to allow him to take off any more, and the plaintiff desisted. In 1869 the club sold the vessel to one C., who gave a chattel mortgage for the unpaid purchase money, and on making default, judgment was recovered against him, and, under a *fi. fa.* goods thereon, C's interest was sold to defendant, the plaintiff being at the sale and informing defendant of his claim. It was proved that the vessel had become a total wreck, and useless as a ship. The defendant having refused to give up the copper after demand made, the plaintiff in December, 1875, brought trover therefor, when defendant insisted that plaintiff's right was barred under the Statute of Limitations, for that there was a conversion by the club's refusal to allow the copper to be taken off, or at all events by the sale to C.; and that six years had elapsed in either case before action brought.

*Held*, that the plaintiff was entitled to the copper, and to maintain trover for it, and that neither of the acts relied on by defendant amounted to a conversion or could be so set up by him.

DECLARATION: Trover for the conversion of certain copper, copper sheeting, &c., attached to the framework of a vessel or boat lying on the defendant's premises, being a certain water lot in the city of Toronto.

The defendant pleaded not guilty, and not possessed.

The cause was tried before Hagarty, C. J., without a jury, at Toronto, at the Fall Assizes of 1876.

It appeared that in or about the year 1857 the plaintiff purchased from the owner of a certain steamboat called "The Provincial" the copper, copper sheeting, &c., on her; and it was understood between them that when a suitable time arrived, as for instance by drydocking or hauling out of the ship, the plaintiff was to get the copper. Shortly after this the owner sold the hull to the then unincorporated yacht club, informing them of the previous sale to the plaintiff; and there was a like understanding as to the plaintiff ultimately getting the copper. The yacht club took possession of the vessel and moved her alongside the Esplanade, using her as a club ship. Some time afterwards the plaintiff, with the assent of the yacht club, took off the copper sheets on the vessel's bottom down to the water line; but the members of the club, thinking that a great deal of damage was being done to the vessel, would not allow any more to be taken off, though they did not dispute the plaintiff's ownership, and the plaintiff then desisted. At the same time they offered to allow the plaintiff to take the vessel to a dry dock, but this was never done. Subsequently the club members by opening a valve or boring a hole in the vessel's bottom caused her to sink down a few feet in the mud, where she lay for several years.

The plaintiff never actually demanded the copper from the club, but always claimed it as his own.

In 1868 the club was incorporated, continuing to use the vessel as a club ship.

In 1869 the yacht club having erected a club house on the water near by, and not requiring the vessel, advertised her for sale, and on the 6th of October, 1869, they sold it to one Carley for \$950, and gave him possession, Carley paying \$50 down and agreeing to give a chattel mortgage for the balance, but which was not executed until the 25th of February, 1870. In the spring of 1870 the vessel broke from her moorings and drifted on to the defendant's waterlot, where she sank, and has remained ever since.

Afterwards, Carley having made default in payment of the mortgage money, an action was commenced against him, and he then filed a bill in Chancery, to which the plaintiff was made a party, and applied for an injunction to restrain the yacht club from proceeding with the action, on the ground that the copper was owned by the plaintiff and the fact had been concealed from him, Carley. The bill was dismissed.

The yacht club then entered up judgment against Carley and issued a *fi. fa.* goods, under which the vessel was seized by the sheriff, and on the 20th of March, 1873, Carley's interest in her was sold to the defendant, the plaintiff being at the sale and informing the sheriff and the defendant that he owned the copper.

It was proved that the vessel was a total wreck, her back broken, upper works carried away, &c., and that her usefulness as a ship was at an end.

The defendant claimed that under the sale the copper belonged to him.

The plaintiff proved a demand and refusal.

A certificate of registry was put in dated, April the 20th, 1854, the last entry on which was dated April, 1865, and was to the effect that the engine had been taken out, and register closed.

This action was commenced on the 14th December, 1875.

For the defendant it was objected that the plaintiff had proved no title to the copper: that it formed part of the hull, and it was necessary to prove ownership to the hull: that the vessel was registered when the plaintiff purchased, and there was no bill of sale or entry on the certificate of ownership, and therefore nothing passed to the plaintiff: that the plaintiff and defendant were at most tenants in common, and trover would not lie: that there was no conversion by the defendant, as the copper was in the same shape it always was: that the plaintiff was bound by the statute of limitations, as there was a conversion by the club when he was stopped taking off the copper; and at all events there was a conversion in October, 1869, when the club sold to Carley and put him in possession.

The learned Chief Justice was of opinion that there was *primâ facie* evidence of a conversion; and he found the value of the copper to be \$700, and entered a verdict for the plaintiff for that amount.

In Michaelmas term, November 22nd, 1875, *J. E. Robertson* obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict for the plaintiff and to enter a verdict for the defendant.

In the same term, December 5th, 1876, *McMichael*, Q. C., shewed cause. The plaintiff has clearly proved a title to the copper, namely, by purchase from the original owner, and there was no necessity to prove ownership to the hull. There is nothing in the objection as to registry, as at the time of the sale the vessel had ceased to exist as a vessel, and the registry has been cancelled; at all events, registry is not necessary as against the defendant, who is a mere wrongdoer: *Sutton v. Buck*, 2 Taunt. 302; *Abbott on Merchants' Ships and Seamen*, 11th ed., 67. There never was any conversion by the yacht club so as to give a title under the Statute of Limitations, as they always admitted the plaintiff's right. They clearly admitted his right at the time they stopped the plaintiff taking off the copper; and at the time of the sale to Carley there was no claim made by them to the copper; but, even if there was a conversion then, it is within the six years. Moreover, the club and the plaintiff were either joint tenants or tenants in common, and a mere sale by itself would not constitute a conversion. But even assuming that there was a conversion by the club, the defendant cannot avail himself of it: *Lord Montague v. Sandwich*, 7 Mod. 99; *Beadle v. Hunter*, 3 Strobh. 331; *Wilkinson v. Verity*, L. R. 6 C.P. 206; *Angell on Limitations*, 6th ed., sec. 324. The damages were clearly proved.

*Osler* and *J. E. Robertson*, contra. The vessel at the time of the sale to plaintiff was a registered vessel, and it was not until 1865 that the registry was cancelled; the sale of the copper to the plaintiff therefore should have

been by bill of sale, and entry on the certificate of ownership. The plaintiff also should have proved that he acquired a present right of possession, and not merely a reversionary right after the vessel ceased to be any further use to the club. The plaintiff and the defendant were not joint tenants or tenants in common; but, even if they were, then the hull and the copper being inseparable, the plaintiff should have proved a right to the hull, and there would be no conversion: *Bradley v. Copley*, 1 C. B. 685; *Gordon v. Harper*, 7 T. R. 9; *Fennings v. Lord Grenville*, 1 Taunt. 241; *Mayhew v. Herrick*, 7 C. B. 229; *Freeman on Cotency and Partition*, secs. 385, 386. The defendant here acquired a title under the Statute of Limitations. The refusal to allow the plaintiff to take off the copper was in itself an act of conversion, from which the statute would run; at all events the sale to Carley was such an act, and there was more than six years before the commencement of the action: and defendant can set up the right thus acquired: *Scott v. McAlpine*, 6 C. P. 302; *Montague v. Lord Sandwich*, 7 Mod. 99; *England v. Cowley*, L. R. 8 Ex. 126; *Hiort v. Bott*, L. R. 9 Ex. 86; *Hedley v. Scissons*, 33 U. C. R. 215; *Wilbraham v. Snow*, 2 Wms. Saund., ed. 1871, 87, 111; *Harper v. Godsell*, L. R. 5 Q. B. 422; *McNabb v. Howland*, 11 C. P. 434; *Jones v. Brown*, 25 L. J. N. S. Ex. 345; *Heath v. Hubbard*, 4 East. 110, 121; *Curtis v. Coleman*, 22 Grant 561; *Tripp v. Armitage*, 4 M. & W. 687.

February 5th, 1877. HAGARTY, C. J., delivered the judgment of the Court.

The circumstances of this case are so peculiar that it is not likely we shall find any authority directly in point.

We must endeavour to decide it on general principles.

Up to within six years before the bringing of the action, which was, on the 14th December, 1875, we are unable to see any such conversion of the plaintiff's property by the Yacht Club, or any one else, which would operate as a divesting of his interest, or barring his right to recover.

We must consider the relative rights of the parties.

So far as would be possible, each should be allowed the use of and dominion over his share. We think the owners of the vessel would have the right to say that the plaintiff must not obtain control over or possession of his copper to the destruction or injury of their property. If the copper had been sold to the plaintiff with the absolute right to take it at once, or when he pleased, the subsequent purchaser of the hull would take it subject to such right, and the denial or obstruction of such right might be a conversion against him.

But such does not appear to me to have been the fact. By the understanding of all parties, there would be a time—not fixed—when each could get his own, and the united properties severed. Until the arrival of such time, I do not think that either would be held to convert the other's property by objecting to a severance, which might be destructive or disastrous to the interests of either—especially while all through their dealings and communications neither denies the other's right.

We do not see why we should infer the occurrence of a conversion by the mere lapse of time, when neither party apparently claimed any right to what belonged to the other, the delay being almost wholly attributable to the known practical difficulty of severing the two interests.

It is not easy to suggest any case exactly like the present. In the case of joint tenants or tenants in common, we cannot see anything done here that would amount to a conversion.

The law is very elaborately discussed in *Mayhew v. Herrick*, 7 C. B. 229. Coltman, J., at p. 246, says: "The authorities are too strong to be got over, that the mere sale of a chattel by one of two joint owners, is not a conversion as against the other. \* \* There is nothing here to shew that the defendant has so conducted himself as to put it out of the power of the plaintiff to take his property, or to pursue his remedy against the parties who have got possession of it."

Cresswell, J., at p. 248, says: "If, however, the thing be

destroyed, or sold so as to change the property, as, in market overt, the case is different. So, here, if the plaintiff could have shewn that the goods were so disposed of as to prevent him from following his legal rights, he might have been entitled to maintain trover."

Williams, J., at p. 250, says: "The true rule is, that the sale of a chattel by one of two joint tenants is not a conversion, unless it operate altogether to deprive his companion of his property in it."

To the same effect, Draper, C. J., in *McNabb v. Howland*, 11 C. P. 434.

We can see nothing in the sale to Carley to amount to a conversion. The plaintiff's right to his copper was in no way affected thereby, and the case cannot be stronger against the plaintiff because there was no actual tenancy in common.

As to what amounts to a conversion or evidence of conversion, we may refer to such cases as *Pillott v. Wilkinson*, 2 H. & C. 72, and in Error, 3 H. & C. 345; *Burroughes v. Bayne*, 5 H. & N. 296, 301; *Vaughan v. Watt*, 6 M. & W. 492; *England v. Cowley*, L. R. 8 Ex. 126.

The facts of this case, if left to a jury as evidence of a conversion, would, in my opinion, be held insufficient to prove it.

*Philpott v. Kelly*, 3 A. & E. 106, is an instructive case as to a defendant setting up the statute in trover.

Coleridge, J., says: "The burden of proof, upon the plea of the statute, lay on the defendant; and the question is, not whether, upon the acts done, a jury, or this Court putting itself in the place of a jury, would have been warranted in finding a conversion, but whether the facts are so clear that the Judge should have put it to them almost as a conclusion of law, that a conversion was proved; or so clear, at all events, that they ought to have found a conversion."

The adoption of this principle would, I think, here dispose of the defence—a previous wrong of defendant or his vendor set up to excuse one more recent.

As a juror I could not possibly find any conversion on such evidence.

The cases cited shew that the mere refusal to give up to the true owner can be explained, and that reasonable time to make enquiry or to ascertain rights, &c., is to be allowed.

Against the often expressed intention and declaration of both parties, I can never assume that there was a wrongful interference with plaintiff's right of property or possession.

The head note to a well argued case of *Heald v. Carey*, 11 C. B. 977, is: "To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right."

When the ship finally lay on defendant's premises a total wreck, her back broken, upper works carried away, &c., and her usefulness as a ship at an end, the plaintiff could, I think, properly and finally claim to take his copper, or rather the defendant could advance no valid reason against his having it.

The defendant purchased at the sheriff's sale with the fullest knowledge of the plaintiff's claim and his interest.

I see nothing in the case to prevent our allowing the plaintiff to recover his property from a defendant unjustly detaining it.

*Rule discharged.*

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GOLDSMITH V. THE GORE DISTRICT MUTUAL FIRE  
INSURANCE COMPANY.

*Insurance—Particulars of loss.*

By one of the conditions endorsed on a policy of insurance, the insured was required to deliver a particular and detailed account of the loss, and if required to produce the books of account and other papers, vouchers, original or duplicate invoices.

*Held*, that a reasonable compliance with the condition was only required; that it was therefore sufficient for the insured to furnish such particulars and documents as it was reasonably in his power to do; and that in this case, on the evidence set out below, the condition had been complied with.

THIS was an action on a fire policy, dated 5th of October, 1875, for \$1,000; \$500 on stock of dry goods, millinery,

fancy ware, and fixtures, and \$500 on furniture, beds, bedding, linen, and wearing apparel: averring loss by fire.

Pleas: 1. *Non est factum*. 2. Denial of loss. 3. Arson. 4. Setting out a condition endorsed on the policy, which required immediate notice, and a delivery within thirty days of a particular and detailed account of the loss; and that the plaintiff should, if required, produce the books of account and other papers, vouchers, original or duplicate invoices, &c.: that, amongst other things, the plaintiff did not, although reasonably required, produce the books of account and other papers and vouchers, and original or duplicate invoices, or permit extracts and copies thereof to be made.

5. Fraud, in stating that the loss was \$2,177 60, whereas some of the goods were saved, and the loss was much less.

Issue.

The cause was tried before Harrison, C. J., without a jury, at Hamilton, at the Winter Assizes of 1877.

The defendants at once abandoned the plea of arson; and admitted immediate notice of loss. The proof papers were produced and admitted.

The fire occurred on Sunday morning, 12th of February, 1876.

A good deal of evidence was given.

The plaintiff gave the usual proof in such cases. She was examined most minutely as to her stock, and her statements were not without corroboration.

The defendants went into evidence to prove that the loss could not have been as much as was claimed.

The learned Chief Justice found all the issues in favour of the plaintiff.

He expressed himself satisfied that she had really lost the amount insured on the goods.

He expressed some doubt as to the fourth plea.

With the claim papers the plaintiff furnished an account giving details of her loss.

On the 25th of February, the defendants' inspectors, after receipt of the claim papers, wrote to the plaintiff's

attorney requiring invoices of all goods purchased or duplicates certified by the persons from whom she bought; also certified statements as to the cost of counter, glass case, shelving, and partitions, from the persons who furnished them; also invoices of oil cloth, &c.

Another letter, dated 7th of March, from the defendants to the plaintiff's attorney, was put in: "In reply to yours of the 2nd inst., I beg to say that Miss Goldsmith must furnish us with the documents asked for by our inspector in his letter to you of the 25th ult. To your previous letter I thought it unnecessary to reply, as our inspector was on his way to Hamilton, &c."

These invoices of goods were furnished by the plaintiff to the defendants; but it did not appear from the evidence distinctly whether after or before this last letter. The gentleman by whom they were given to defendants had since died.

If, after the last letter, then it was argued that the defendants had waived any such objection, not having called the plaintiff's attention to it, under 38 Vic. ch. 65, sec. 1, by which, when after the statement of proof of loss given, &c., the company objects to loss, on other grounds, &c., or does not within reasonable time, &c., notify the assured that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time, or when from any other reasons the Court or Judge, &c., consider it inequitable that the insurance should be deemed void, &c., by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof, or amended statement, &c., should be allowed as a discharge of the liability of the company, &c.

One item was noticed by the Chief Justice: "Woollen dresses for infants, comforters, jackets, &c., \$200."

It was insisted for the defendants that this was not sufficient, and also as to her other stock, that the invoices, &c., had not been produced.

The Chief Justice held that she had furnished all the

invoices in her power to furnish, as her purchases were mostly for cash ; and he entered a verdict for the plaintiff.

In this term, February 8th, 1877, *Durand* (Galt) obtained a rule *nisi* under the Law Reform Act to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendants, or reduce the verdict.

In this term, February 16th 1877, *Osler*, Q. C., shewed cause. The evidence shewed that the plaintiff fully complied with the condition as to proofs of loss. Her purchases were mostly for cash, and she never had invoices, or any means of procuring them : but in all cases in which she was able to procure them she did so; *Stickney v. Niagara District Mutual Ins. Co.*, 23 C. P. 372. At all events, the further proofs having been given after the receipt of the defendants' letter, without any further objection, the defendants are estopped under 38 Vic. ch. 65, sec. 1, O., from now insisting that the proofs are defective. Under this section also, the defendants having objected to the insurance on other grounds than that of the imperfect compliance with the condition, namely, on the ground of fraud and arson, the condition as to defective proof cannot be relied upon.

*Osler* and *Durand* (of Galt), contra. The evidence shews that the plaintiff never did comply with the condition as to giving a detailed statement of the loss and producing the invoices, &c., and the Courts have held this to be a most reasonable condition, and one that is necessary for the protection of insurance companies. When persons become insured it is their duty to prepare themselves so as to be able in case of loss to comply with the condition, and give the necessary details of the loss ; and therefore in every case the failure to comply with the condition, even though it may be through inability to do so, defeats the claim. The evidence, however, shews that the plaintiff did not furnish the proofs of loss within her power to do. The mere fact of her having only been in business for a few months, and made all the purchases herself, shews this :

*Carter v. Niagara District Mutual Ins. Co.*, 19 C. P. 143 ; *Greaves v. Niagara District Mutual Ins. Co.*, 25 U. C. R. 127 ; *Stickney v. Niagara District Mutual Ins. Co.*, 23 C. P. 372 ; *Lindsay v. Lancashire Fire Ins Co.*, 34 U. C. R. 440. The letter written here requiring the further proof, was after the additional proofs were furnished ; and therefore 38 Vic. ch. 65 sec. 1, does not apply. Also, the section does not bear the construction attempted to be placed upon it as to fraud and arson.

March 9th, 1877. HAGARTY, C. J., delivered the judgment of the Court.

A very full examination of the evidence leads to the conclusion arrived at by the learned Chief Justice, who found all the issues in favour of the plaintiff.

On the argument before us in term, it was strongly insisted by Mr. Osler and Mr. Durand for the defendants, that the plaintiff was bound to furnish all the invoices and documents demanded, and that the fourth plea was in effect proved.

We think the conditions set out in the fourth plea must be construed on some common sense principle, and not, as we understand the argument, that the giving of invoices, producing books, &c., are essential in every case, whether such things in fact exist or are in the power of the assured to give.

The plaintiff was bound to give all information and particulars reasonably required, &c., in her power to give. It will always be a question for trial whether she can give such or not. A person in business, as she was, is naturally examined in detail as to her dealings, and the places at which she purchased the goods complained of as being lost. She will be expected to give some reasonably clear account of this, and explain why she cannot produce invoices or books of account. Her answers on these points go to establish the honesty or dishonesty of the claim she advances.

It would be a fair matter of discussion and decision,

whether as to such an item as the \$200 for childrens' woollen dresses, &c., it could or should not be more fully detailed.

The argument seems pushed to the assertion that a person insuring is bound to be provided beforehand with full proof of all the details of possible loss.

In many cases the previous preparation of such details might give rise to a strong suspicion that the fire and the claims of loss to be made thereon was a foregone conclusion.

The honest unsuspecting insured would be probably the person least prepared to prove a loss with such particularity as would satisfy a certain class of insurers.

Apart from the statute, we think the evidence given in the present case quite sufficient to satisfy the requirements of the policy as to proof of loss.

Under all the circumstances we think the plaintiff did all in her power to furnish information to the defendants, and that the fourth plea has been fairly met.

It is much to be regretted that many insurance companies do not transfer a little of that habit of minute and rigorous analysis and detail as to the amount of a loss incurred, to the original acceptance of the risk. Too frequently we find it proved that the insurance is effected at the persistent urgency of their agents, who look and examine over the property proposed to be insured. When the loss occurs, then it is insisted that the property was of much less value, and the insured is often asked to give details and procure vouchers, in a most unreasonable manner.

The prevalence of this custom has naturally had the effect of disinclining jurors from accepting too readily the charges of fraud, perjury, and arson, so liberally advanced against the insured, and so often wholly unsupported by evidence.

In this case, without any finding of a jury, we as Judges can fully agree with the learned Chief Justice who tried the case, that on the evidence adduced the plaintiff is rightfully entitled to the verdict.

In the view of the case which we take, we have not considered the objection raised by the plaintiff as to the effect under the statute of the plea of arson.

*Rule discharged.*

# SMITH V. THE MUTUAL INSURANCE COMPANY OF CLINTON.

*Insurance—Premium note—Non-payment—Assessments—Waiver—Pleading.*

To an action on a mutual insurance policy on a dwelling house and furniture, defendants pleaded that a certain assessment was declared by defendants on plaintiff's premium note, of which assessment the plaintiff had due notice, but did not pay the same, whereby the policy became void.

*Held*, reversing the judgment of Harrison, C. J., plea good; for that the allegation of due notice, without stating the particulars of the notice or the manner of giving it, was sufficient.

A replication alleged that subsequent to the alleged avoidance, and previous to the loss, defendants levied another assessment which the plaintiff was duly notified of and paid, whereby defendants waived the alleged forfeiture and revived the said policy; and therefore they ought not to be allowed to plead the said plea.

*Held*, affirming the judgment of Harrison, C. J., replication good, as shewing a clear revival of the policy, and estopping defendants from setting up the previous forfeiture.

A rejoinder alleged, that no part of the assessment mentioned in the plea was or is included in the assessment mentioned in the replication: that before the making of such last assessment the policy had been cancelled and so marked in defendant's books; and that such last assessment was not in fact made upon plaintiff's policy, but that defendants' secretary through inadvertence and mistake notified plaintiff of said assessment and the amount thereof; and that subsequent thereto, and prior to the loss, several further assessments were made by defendants, to which plaintiff would have been liable unless the policy were cancelled, but by reason of such cancellation, no assessment on the said policy was made, and the said amount in the plea mentioned still remains unpaid; and alleging that defendants were willing and thereby offered to return the amount paid.

*Held*, reversing the judgment of Harrison, C. J., rejoinder bad, there being no averment of any notification to the plaintiff of the notice having been sent to her and the money received by mistake, nor of it being tendered to or paid back to her, and it appearing that she had been allowed after making the payment to consider herself still insured.

ACTION on a policy of insurance, dated 17th January, 1873, for \$1150, namely, \$664 on dwelling house, and \$486 on furniture, &c., contained therein, setting out the con-

ditions endorsed on the policy, alleging a loss by fire, and averring performance of all conditions precedent.

Plea: that the plaintiff, to secure the payment of the premium of the sum of \$26.25, deposited with the defendants her promissory note for \$26.25 at the time of said insurance, and that afterwards, on the 3rd of May, 1873, the defendants declared an assessment upon the said premium note of 33 cents, payable at the office of the defendants in the town of St. Catharines, immediately after the said assessment, of which assessment the plaintiff had due notice, and up to the time of the fire did not pay the same according to section 5 of 29 Vic. ch. 37, which said section was endorsed upon the said policy; and by reason of the said non-payment as aforesaid the said policy thereupon became null and void.

First replication: that the defendants ought not to be admitted to plead the said plea by them above pleaded, because she says that on, to wit, the 15th of August, 1874, the said company passed a resolution to levy an assessment of \$7.77, payable at the company's office at St. Catharines, on or before the 15th of September following, of which the plaintiff was notified, and duly paid the same, and the defendants by their own acts and conduct, and by the levying of said assessment, and collecting, and receiving the same before the said loss, waived the alleged forfeiture, and continued and renewed the said policy, notwithstanding the alleged assessment in said plea mentioned, and the nonpayment thereof, and the alleged avoidance of said policy by the effect of said section of said statute; and this the plaintiff is ready to verify. Wherefore she prays judgment if the defendants ought to be admitted, contrary to their own acknowledgment of the validity and existence of said policy, to plead that the same became null and void by reason of the alleged default of the plaintiff, in the non-payment of the alleged assessment of 33 cents.

Second replication, on equitable grounds: that the said company, after the said alleged assessment and nonpayment thereof released the plaintiff from the alleged for-

feiture of said policy, and renewed the same, and made subsequent assessments on the same, and received and collected the said alleged assessment of 33 cents and such subsequent assessments before the said loss, whereby the said policy became, and was at the time of said loss, and is, a valid and subsisting policy, and was not at the time of said loss, and is not, null and void.

Rejoinder to the replications: that defendants ought not to be barred by anything in said replications alleged from pleading the matter in said plea contained, because they say that no part of the assessment in the said plea mentioned was or is included in the said assessment and sum in said replication mentioned, and that before the making of the said last mentioned assessment, the said policy had been cancelled by the defendants, and had been marked cancelled in their books, and the said last mentioned assessment was not in fact made upon the plaintiff's policy; but the secretary of the defendants by inadvertance and mistake notified the plaintiff of the said assessment and named the amount thereof, and several assessments between the making of the said last mentioned assessment and the said loss have been made by the defendants, and to which the plaintiff would have been liable had the said policy not been cancelled, but by reason of the said cancellation no assessment in respect of said policy has been made, and the said assessment in the said plea mentioned yet remains unpaid; and the defendants are willing and hereby offer to return the amount paid to them in said replication mentioned.

To the rejoinder the plaintiff demurred, on the following grounds:

1. That it is no answer to said replication of estoppel, that the defendants, by a mistake of their officer, notified the plaintiff of the assessment and amount thereof referred to in said plea by way of estoppel, and that they are willing to return the same.
2. That as a legal rejoinder or otherwise, for like reasons, it is not an answer to said equitable replication.

3. That mistake is not an answer at law to the plaintiff's pleading, and such alleged mistake is not an answer in equity.

4. That said rejoinder is bad, in attempting to set up as a defence several subsequent assessments between the making of the assessment replied and the loss, as an answer to the plaintiff's replication.

5. That said rejoinder should further excuse the defendants from receiving and retaining the assessment in the replication pleaded.

6. That for aught that appears by said rejoinder the defendants knew of the receipt of said assessment, and accepted and used same.

The defendants joined in demurrer and took the following exceptions to the first replication :

1. That it appears by the said plea and replication that the said policy became void by reason of the non-payment of the assessment mentioned in the said plea.

2. That the said first replication is no answer to the plea, as it admits the material statements therein without avoiding the same, and in seeking to set up a new or ratified policy by virtue of an alleged waiver after the said policy had become void is a departure from the declaration.

3. The defendants also excepted to the sufficiency of the first and second replications, on the ground that it appears therefrom that the policy is void for the reasons aforesaid.

On January 30th, 1877, the demurrer was argued.

*H. J. Scott*, for the plaintiff.

*M. C. Cameron*, Q. C., for the defendants.

February 2nd, 1877. HARRISON, C.J.—The first question is, as to the sufficiency of the plea.

It is declared by section 5 of 29 Vic. ch. 37, that in case any note given or to be given for a cash premium of insurance, &c., or any sum that may thereafter be assessed upon a premium or deposit note, &c., shall remain in arrear and unpaid for thirty days after the same shall be payable,

the policy of insurance held by the person in default shall thereupon become absolutely null and void, &c.

It is by section 8 of 31 Vic. ch. 32, O., made the duty of the company to mail to the person assessed at his or her post office address, (as given at the time of the insurance being effected, or thereafter,) a notice containing the particulars of the assessment against such person.

These provisions are re-enacted in sections 43 and 44 of 36 Vic. ch. 44, O.

The plea avers that on the 3rd of May, 1873, the defendants declared an assessment, upon the premium note of the plaintiff to the amount of 33 cents, payable at the office of the defendants, of which assessment the plaintiff had due notice, &c., but did not pay the same, &c.

It is not averred in the plea as a fact, that a notice containing the particulars of the assessment, such as required by section 8 of 31 Vic. ch. 32, O., was mailed to the plaintiff, as that statute directs.

As said by Galt, J., in *Crowley v. Agricultural Mutual Assurance Association*, 21 C. P. 567, 571, 572, "it is a fundamental rule of pleading that facts, and not conclusions of law to be drawn from them, are to be pleaded."

The plea is, I think, because of the want of an allegation of the notice made necessary by 31 Vic. ch. 32 section 8, mailed as that Act directs, bad, on the authority of *Crowley v. Agricultural Mutual Assurance Association*, and for the reasons given by Mr. Justice Galt in that case.

This renders unnecessary any expression of opinion as to the subsequent pleadings, except with a view to the distribution of the costs of the issues.

I am not, without further consideration, altogether prepared to assent to the argument that the policy is, under the operation of sec. 5 of 29 Vic. ch. 37, absolutely void, and not merely voidable at the election of the underwriters. See *Armstrong v. Turquand*, 9 Ir. C. L. R. N. S. 32; *Young v. Billiter*, 8 H. L. Ca. 682; *Maxwell* on Interpretation of Statutes, 184.

But assuming, for the sake of argument that this is so,

I am of opinion, on the facts disclosed in the replication, that the defendants are estopped from setting up the invalidity of the policy. See *Wing v. Harvey*, 5 DeG. McN. & G 265; *Supple v. Cann*, 9 Ir. C. L. R. N. S. 1; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69; *Chapman v. Gore District Mutual Ins. Co.*, 26 C. P. 89. See further *Neely v. Onondaga County Mutual Ins. Co.*, 7 Hill N. Y. 50; *Insurance Company v. Slockbower*, 26 Penn. 199; *Cumberland Valley Mutual Protection Co. v. Mitchell*, 48 Penn. 374; *Elliott v. Lycoming County Mutual Ins Co.* 66 Penn. 22.

And because the replication is a good replication of estoppel, and so fortifying the declaration, I am of opinion the replication is not bad for departure: *Prince v. Brummatte*, 1 Bing. N. C. 435, 438; *Brine v. Great Western R. W. Co.*, 2 B. & S. 402; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69.

The rejoinder, which, among other things, alleges that "the assessment was not in fact made upon the plaintiff's policy," &c., is to that extent a traverse of the replication, and as such the rejoinder may, I think, be sustained.

The result is, that there will be judgment for the plaintiff on the demurrer to the plea and replication, and for the defendants on the demurrer to the rejoinder.

*Judgment accordingly.*

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From this judgment the plaintiff appealed to the full Court.

In this term, the demurrer was argued.

*H. J. Scott*, for the plaintiff. The plea, as held by the learned Chief Justice, is bad. It does not allege a sufficient notice of assessment under 31 Vic. ch. 32, sec. 8, O. It is

not sufficient to allege, as here, that the plaintiff had due notice, which is merely a conclusion of law; but the facts should be stated from which such conclusion is arrived at; and it is so laid down in *Crowley v. Agricultural Mutual Assurance Association*, 21 C. P. 567. The replication is good. Section 5 does not render the policy absolutely void; but merely voidable at the election of the company, who have the right to waive the forfeiture, and the facts set out in the replication constitute such waiver; but even the effect of the section is to render it absolutely void, then the facts set up estop defendants from setting up its invalidity. The rejoinder is no answer. The mistake of defendants' officer cannot affect the plaintiff. He cannot be assumed to be cognizant of the interior working of the company, and that the agent is acting without authority; also, for all that appears, the defendants may have been fully aware of the assessment having been made and satisfied. It is also bad in setting up the non-payment of subsequent assessments, as this amounts to a departure.

*McMichael*, Q. C., for the defendants. The allegation in the plea of the plaintiff having received due notice is sufficient; for if the plea were framed as contended for by the opposite side, it would clearly be demurrable as stating matters of evidence. The case of *Crowley v. Agricultural Mutual Assurance Association*, 21 C. P. 567, is no authority for the plaintiff, as there no notice was alleged at all. The replication is not sufficient. The effect of the non-payment of the previous assessment is, to absolutely avoid the policy, and there is nothing shewn which could reinstate it; but even if a notice of and payment of a subsequent assessment could have that effect, then the rejoinder shews that no such assessment was ever made by the company, but that the notice was given and the amount received without the authority or knowledge of the company, and through a mistake on the part of the agent, which clearly cannot affect the company.

March 9th, 1877. HAGARTY, C. J., delivered the judgment of the Court.

It seems to us that the decision of this Court in *Crowley v. Agricultural Mutual Assurance Association*, 21 C. P. 567, cannot be relied on as an authority against the plea.

The plea sets out the assessment of 33 cents on the plaintiff's premium note, "of which assessment he had due notice."

Sec. 8 of 31 Vic. ch. 32, says that, in addition to the notices now required to be published, it shall be the duty of every Mutual Insurance Company to mail to the person assessed, at his or her post office address, &c., notice, &c.

We are of opinion that an averment that the assessment was duly made, and that the plaintiff had due notice of it, is sufficient in pleading; and when issue is taken on it the necessary notice must be proved to be given as the law requires.

All that was necessary to be decided in *Crowley v. Agricultural Mutual Assurance Association*, was, that a plea wholly omitting any averment of notice of the assessment was bad. Nothing is decided as to the necessity of setting out the manner in which due notice was sent.

In the absence of any direct authority, we think that an averment that a person had due notice is sufficient, without stating the manner in which it was given, or the evidence in support of the allegation.

It is generally sufficient in pleading a devise to state that a will was duly executed so as to pass real estate, without stating the number of witnesses or other requirements of the law.

As to the replication, we think it is good. The plea shews matter involving the forfeiture and avoidance of the policy. The answer is in effect that subsequent to the alleged avoidance the company levied another assessment of \$7.77, of which the plaintiff was notified, and duly paid the same, all before loss, and so the defendants by their acts, &c., waived the alleged forfeiture, and revived the policy, and ought not to be allowed to plead the said plea.

This seems to shew a clear revival of the policy—a pay-

ment to the plaintiff thereon ; and that the defendants cannot be allowed to fall back on a previous default, to destroy the plaintiff's right.

As to the rejoinder, the defendants assert that no part of the 33 cents first assessed formed part of the second assessment : that before the last assessment the policy had been cancelled, &c., and the second assessment was not in fact made on the plaintiff's policy, but the secretary inadvertently notified the plaintiff thereof : that afterwards other assessments were made before the loss, none of which were notified to the plaintiff ; and the defendants thereby offer to return the money paid to them, as mentioned in the replication.

There is no averment that any notice was ever given to the plaintiff, that she had been notified by mistake, or that her money had been received by mistake, nor was it ever tendered or paid back to her.

On these statements, it appears that the plaintiff, after paying the required assessment, was allowed to consider herself still insured down to the happening of the loss. She is told for the first time, in this suit, that, although her money was taken and retained, and her property destroyed, that she has been for all this time uninsured.

We hope the law is not so defective as to permit the injustice sought to be perpetrated at the expense of this plaintiff.

We think the rejoinder is bad, and does not legally avoid the matters confessed.

We hold the plea good against the objection taken : the replication good ; and the rejoinder bad.

*Judgment accordingly.*

## CHATILLON V. THE CANADIAN MUTUAL FIRE INSURANCE COMPANY.

*Insurance—Agent filling in application—Illiterate person—Vendor's lien  
—Owner—Occupation.*

In an action on a mutual policy of insurance, it appeared that to enable the defendants' local agent to fill in the application which formed part of the policy, the insured, who was a French Canadian and unable to read or write, truly stated to the agent all the facts material to the risk, including those relative to title and incumbrances; and the agent then filled in the application, as also the plaintiff's name which he signed as a marksman; but, in so filling it in, the agent, without the authority or knowledge of the insured, misstated the facts as to the title and incumbrances.

*Held*, that defendants, under the circumstances, must be restrained in equity from setting up, under the terms of the statute, 36 Vic. ch. 44, sec. 36, O., or of the conditions on the policy, the act of their own agent as an avoidance of the policy.

A second policy in which, as before, the application was filled in by the agent; but the plaintiff had the benefit of the services of his son, who was able to read and write, and who acted as his agent in procuring the insurance, and signed his name to the application, was on that ground distinguished from the above, and the policy held void.

*Held*, that a vendor's lien for unpaid purchase money, according to the law of Quebec, of land situate in that Province, is an incumbrance within the meaning of the question in that behalf in the application.

*Held* also, that a person may truly state that he owns a building erected on the land, notwithstanding such vendor's lien; and also that he occupies such building, notwithstanding that his son and son-in-law live with him.

**DECLARATION.** First count: Upon a policy of insurance against fire, executed upon the mutual insurance principle, by the defendants, under their common seal, and bearing date the 8th day of April, 1875, whereby the defendants insured the plaintiffs for the term of three years, from the 23rd March, 1875, to the amount of \$1,000, upon the building only of a two-story wood shingle-roof building, occupied as a dwelling and hotel, situate on the west side of Queen street, near Chamberlain street, half-a-mile east of the city of Hull, against loss or damage from fire or lightning, averring that the plaintiff duly gave to the agent of the company, through whom the policy was effected, his premium note for \$120, on which he paid \$12 in cash. The count then averred a loss by fire, and the delivery by the plaintiff in due form and manner of a particular

account of his loss, yet that, although the plaintiff had conformed himself to and observed all things upon his part, the defendants had not paid the said sum so insured.

Second count: in similar terms, upon another policy, also upon the mutual principle, executed by the defendants, and bearing date the 5th day of June, 1875, whereby the defendants insured the plaintiff for the term of three years, from the 23rd of May, 1875, against loss or damage by fire, to the amount of \$500, on the plaintiff's two and a half story wood shingle-roof dwelling, situate on the corner of Queen's highway and Chamberlain street, in the city of Hull.

Pleas: 1. That the said several policies were not the defendants' deeds.

2. That the plaintiff was not at the time of the alleged loss or damage interested in the said properties, or any of them, as alleged.

3. One plea to both counts, to the effect following, viz.: that among other things in said policies set forth, it is declared and agreed that the applications of the assured, upon which the said policies were respectively granted, should be taken and considered as a part and portion of said respective policies, and that if the assured in said applications should have made any erroneous representation, or omitted to make known any fact material to the risk, or if the assured were not the sole and unconditional owner of the property insured, unless the true title was therein expressed, then, and in every such case, the said policies should be void. And the defendants aver that the plaintiff, in each of his said applications, upon which the said policies of insurance were respectively issued, stated that he, the plaintiff, owned and occupied the said buildings, and that the said properties belonged exclusively to the said plaintiff, and that there was no incumbrance thereon, whereas the defendants allege that the plaintiff did not own the said buildings, and that the said property did not belong exclusively to the plaintiff, and that the said property was incumbered and subject to a

mortgage or lien thereon for the purchase money therefor, and that the plaintiff did not occupy all of the said buildings, but that the same were occupied by other persons than the plaintiff, namely, by one Sylvester Chatillon, by one Joseph Defries, and by one Anna Watson, and that the property occupied by the said Anna Watson was occupied by her for the purpose of a school house, by reason whereof the said policies became void.

4. To the first count: that the policy in the first count mentioned was upon and subject to the following, among other conditions expressed therein: that, in case any sum should thereafter be assessed upon the premium or deposit note, given by the plaintiffs to the defendants, and should remain in arrear and unpaid for thirty days after the same should be payable, the said policy should thereupon become absolutely null and void; and defendants allege that the said premium note was duly assessed under the direction of the board of directors of the company, and the sum of \$12 was assessed upon said note, and due notice of such assessment and of the amount thereof was duly given by the defendants to the plaintiff, by mailing the same to him, directed to his post-office address, as given in his original application for said policy, more than thirty days before the fire, loss, or damage, set forth in the plaintiff's first count, occurred; and the said assessment remained in arrear for more than thirty days after the same became payable, and before the happening of the said fire, loss, or damage, in the said first count mentioned, and still remains in arrear and unpaid—whereby the said policy became null and void.

5. To the first count: that the plaintiff in his application for the policy of insurance, declared on in the first count, concealed from the defendants an incumbrance on the land, on which said buildings set forth in the said application for insurance were erected, to wit, a vendor's lien thereon for unpaid purchase money, to the amount of \$400 and upwards.

6. A plea to the second count, similar to the fourth plea to the first count.

7. A plea also to second count, similar to the fifth plea to first count.

The plaintiff joined issue upon all these pleas, and replied on equitable grounds to the third, fifth, and seventh pleas, to the effect that one Thomas Joseph McLaughlin, of the city of Ottawa, was the duly appointed agent of the defendants for the purpose of canvassing for insurances, and the said agent was authorized by the defendants to request and urge the plaintiff to insure in their company, and to solicit from the plaintiff the applications aforesaid, and to furnish to the plaintiff blank forms of application, the property of the defendants, partly printed, with blanks to be filled up in writing; and the said agent was duly authorized by the defendants to fill up the said blanks from verbal statements to be made by the plaintiffs. And the plaintiff says that the said agent, in pursuance of said authority, and acting in all things at the request and by command of the defendants, visited the plaintiff and urgently requested and solicited him to make the said respective applications for insurance, and the said agent then produced the said blank forms, and the plaintiff thereupon made to the said agent verbally a full and honest disclosure of all matters relating to the property in question, and of the title thereto, and of the occupation thereof and the plaintiff avers that he made no erroneous representation, nor did he omit to make known any fact material to either of the said risks: that at the time aforesaid, the sum of \$600 was unpaid and accruing due, being the purchase money of the land on which said building was erected, which is the alleged incumbrance referred to in the said pleas, part of which building was then in the personal occupation of the plaintiff, and other parts in the occupation of his tenants, Sylvester Chatillon and Pierre Trudelle, and of no other person, all which said facts were duly stated to the said agent, who thereupon, as agent of the defendants, and with their authority, filled up by writing, in the English language, the blanks in said respective applications, which are the applications referred to in the

said pleas, and which applications were never in the plaintiff's possession, nor did the plaintiff insert anything therein: that the plaintiff is a Frenchman and unable to read or write in the English language, of which facts said agent was always aware; and the said agent having filled up the applications as aforesaid, represented to the plaintiff that he had done so correctly, and the plaintiff trusting to said representation of said agent, signed said respective applications at his request, believing them to be correct.

Replication to the fourth and sixth pleas, on equitable grounds: that at the time of the effecting the insurances, and giving the deposit or premium notes, it was agreed between the plaintiff and defendants that, except the cash payments made and endorsed on said respective notes, as in the declaration mentioned, no sum should be demanded or required from the plaintiff on account of said notes, or be payable in respect thereof, until after the expiration of one year from the date of the earliest of said applications, which time had not expired when the fire and loss occurred as mentioned in the declaration; and the defendants, for the consideration aforesaid, extended and agreed to extend the time for payment of the assessments upon said notes until after the expiration of one year from the respective dates thereof, which are the alleged assessments mentioned in said pleas; and the time for payments of such assessments, according to said agreement and extension of time, had not expired when the fire and loss occurred. Issue.

The cause was tried before Moss, J., without a jury, at Ottawa, at the Fall Assizes of 1876.

The application for the respective policies was produced. The former was all filled up in the handwriting of the defendants' agent, and the plaintiff's name written by him, the plaintiff, as an illiterate man, setting his mark.

The second insurance was effected by the plaintiff's son for him, and, although the blanks were filled up in it also by the agent, it was signed by the son in the father's name, the former writing the latter's name thereto. The premium note for the first insurance was signed by the plaintiff as a

marksman, his name being written by the defendants' agent. The premium note for the second insurance was signed by the son in the name of the father, the former acting in that transaction as the plaintiff's agent.

The plaintiff's title appeared to be by a deed executed according to the law of the province of Quebec, in which province the property was situate. The deed purported to be a conveyance of the property by metes and bounds, which was described in the deed as having no buildings erected thereon; and the property was conveyed to the plaintiff, his heirs and assigns, as his and their own property forever, the vendor divesting himself of the same in favour of the said purchaser, and consenting that he be invested with the possession thereof.

The deed contained the clause following, and was dated 10th April, 1873: The present sale is so made for and in consideration of the price and sum of \$600, to be paid as follows, viz.: by yearly instalments of the sum of \$100 each. The first payment whereof to be made on the 2nd day of November, 1873, and so on every year until paid, with interest, in advance, each and every year, at the rate of 7 per centum per annum. And the plaintiff by the deed bound himself to put up buildings on said lot within twelve months, to the value of at least \$500.

It was sworn by persons experienced in the law of the Province of Quebec, that the deed did not operate according to that law as an express mortgage, but that, as the deed shewed that there was purchase money unpaid, the vendor had, so long as any money remained unpaid of the purchase money, a vendor's lien on the land for such unpaid purchase money, the benefit of which would exist against any transferee of the land, the deed being registered in a certain defined time; but whether the lien could affect the subsequently erected buildings, there was a difference of opinion between the legal gentlemen who were examined as witnesses to the law of the Province of Quebec.

The learned Judge, before whom the case was tried

without a jury, found as a fact, that the plaintiff was an illiterate man, and a French Canadian, and unable to read or write; that he informed McLaughlin, at the time of the insurance, who filled in the answers appearing to the questions upon the application for the first insurance, that he had bought the property from a Mrs. Marston; and that he had not paid the purchase money, but had paid the interest.

He found that in fact the plaintiff did disclose the true state of the facts to the defendants' agent, and that the plaintiff was guiltless of any fraudulent concealment, and that it was the agent who inserted the answers to the questions now insisted upon as not being according to the truth.

He found, also, that the directors of the company, when they consented to the insurance, were aware that the plaintiff was an illiterate person, and that the answers to the questions upon the application, and also the signature of the plaintiff, were in the handwriting of their own agent.

He found, also, that the agent knew that there were other persons living in the premises insured besides the plaintiff himself. And, as to the notice of assessment pleaded, he found that the defendants had failed to establish as a fact that they had, as alleged, mailed to the plaintiff any notice of the assessment, the non-payment of which was relied upon as an avoidance of the first policy.

The learned Judge found also that the second insurance was effected by the plaintiff's son for the plaintiff; and, without drawing a distinction between the two insurances, he rendered a verdict for the plaintiff, and \$1,379 damages.

In this term, February 6th, 1877, *Duff* obtained a rule *nisi*, which although specifying several grounds upon which defendants rely as grounds for setting aside the verdict, is really to be considered by us under the Law Reform Act, the case having been tried before the Judge without a jury.

During the same term, February 16th, 1877, *J. W. W. Ward* (of Ottawa) shewed cause. The Court should not

interfere with the finding of the learned Judge who tried the case, who had all the witnesses before him: *Smith v. Hamilton*, 29 U. C. R. 394; *Saunderson v. Burdett*, 18 Grant 417. The learned Judge has found that there was no fraud, misrepresentation, or concealment on the part of the plaintiff either as to title or incumbrances; at all events, the mistatement, if any, was that of the agent to whom all the facts were told, and under the circumstances the company are restrained in equity from setting up their agent's act as an avoidance of the policy: *Mason v. Agricultural Association*, 18 C. P. 19; *Hopkins v. Provincial Ins. Co.*, 18 C. P. 74; *Laidlaw v. Liverpool, &c., Ins. Co.*, 13 Grant 377; *Wyld v. London, &c., Ins. Co.*, 21 Grant 458, 23 Grant 442; *Johnston v. Provincial Ins. Co.*, 26 C. P. 113; *Redford v. Mutual Ins. Co. of Clinton*, 38 U. C. R. 538; *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant 418. As to non-payment of the assessment, the learned Judge has found that the insured never received notice. Moreover, the agreement was that there should be no assessment until the expiration of a year. There should be no reduction under the two-thirds clause, as the property was in fact only insured to two-thirds of the value.

*Duff, contra.* By the terms of the application, the agent is made the agent of the insured, and not of the company, for the purpose of filling in the application. The application is all that the company have to guide them in accepting the risk, and it must be alone looked at; and therefore what passed between the insured and the agent cannot affect the company: *Bleakley v. Niagara District Mutual Fire Ins. Co.*, 16 Grant 199; *Martin v. Home Ins. Co.*, 20 C. P. 447; *Shannon v. Hastings Mutual Ins. Co.*, 25 C. P. 470; *Anderson v. Fitzgerald*, 4 H. L. Cas. 507. There is clearly misrepresentation as to title and incumbrances, as it is proved that there was a vendor's lien on the property, which is an incumbrance within the meaning of the conditions, and had the company been aware of it they would never have accepted the risk. Under the Act and con-

ditions this avoids the policy: *Samo v. Gore District Mutual Ins. Co.*, 26 C. P. 405; *Shannon v. Hastings Mutual Ins. Co.*, 26 C. P. 380. Moreover, the plaintiff can only recover for two-thirds of the amount insured.

March 9th, 1877. GYWNNE, J.—The third plea, which is pleaded to both counts, must be taken distributively, as if it had been pleaded separately to each. And as one count might be found in favour of the plaintiff, and the other against him upon the issue joined upon this plea, I propose to deal with the counts separately.

With respect to these policies of insurance effected upon the mutual principle, the statute 36 Vic. ch. 44, sec. 36, O., enacts that "All policies of insurance issued by the board of directors, sealed with the seal of the company, signed by the president or vice-president, and counter-signed by the escretary or acting-secretary, shall be binding on the company; provided that any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or ownership of the applicant, or his circumstances, or the concealment of any incumbrance on the insured property, or on the land on which it may be situate, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto, shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the board of directors in their discretion shall see fit to waive the defect."

The learned Judge before whom the case was tried, has in the most distinct terms acquitted the plaintiff of any fraudulent misrepresentation, or indeed of any misrepresentation on his part in the application for the insurance, so also of any false statement respecting the title or ownership of the property.

He has found also that the plaintiff did not conceal any incumbrance upon the property, and that he did in fact disclose to the defendants' agent the true state of his title, &c., to the property proposed for insurance, and that what-

ever misrepresentation, false statement, or concealment of facts as to the true state of the title, &c., appears in the application, was not the act of the plaintiff at all, but was the act of defendants' own agent, with full knowledge communicated to him by the plaintiff of the state of the facts, for the purpose of being correctly stated in the application.

The learned Judge, who had the witnesses before him and who had an opportunity of observing the manner of their giving their evidence, upon which so much depends in a pure question of fact such as this, was in a much better position than we can be to decide the point; and I do not think we should be warranted in calling in question the decision of the learned Judge upon a point so purely consisting of a matter of fact, and not depending upon inferences to be drawn from undisputed facts.

Adopting, then, the finding of the learned Judge, I must say that I entertain a strong opinion that the defendants should be restrained in equity from asserting that a misstatement so caused by their own agent, (against the will and knowledge of an illiterate man, who had no means, under the circumstances appearing in evidence, of knowing that the information, correctly given by him to the agent, as found by the learned Judge, had been incorrectly inserted by the defendants' agent,) was a misrepresentation, false statement, or concealment of title, which, in the words of the clause recited from the statute, should avoid this policy.

It may well be that, without imputing any fraud to their agent, he inserted opposite the questions as to incumbrances the answers now objected to, under the impression and belief that a claim of a vendor for a lien for unpaid purchase money did not constitute an incumbrance on the property in the sense in which the questions in that behalf in the application were put; but it would be most inequitable, in my judgment, that the defendants should be permitted to avail themselves, to the prejudice of the plaintiff, of an error of judgment of their own agent.

who having received from this illiterate man full and true particulars, did not put them down correctly, but led him to believe, when he procured his mark to the paper, and signed his name to it, that his answers were correctly stated and given.

The policy therefore could not be avoided, merely by reason of the terms of the clause of the statute above quoted.

As to the answers to the other questions which are objected to, they are comprehended within the same principle; but independently, I do not think any weight is to be attached to these objections; for it is true that the plaintiff does own the building insured, notwithstanding the vendor's lien for unpaid purchase money; and it is a proper enough answer to the question, "Who occupies it?" that the assured does, notwithstanding that his son and son-in-law both live in the building.

These are, however, objections arising under the terms of the policy, and not under the terms of the statute.

A question remains whether, although the policy is not avoided by reason of the terms of the above clause of the statute, is it or not by reason of the terms of the policy itself?

The policy declares that the application of the assured, upon which the policy is granted, shall be taken and considered as part and portion of the policy; and further, that if the assured in the application make any erroneous representation, or omit to make known any fact material to the risk, or if the assured is not the true and unconditional owner of the property insured, unless the true title be expressed therein, the policy shall be void.

Under the circumstances of this case, I do not think that these expressions in the policy call for any different judgment upon the finding of the learned Judge who tried the cause, than is called for by the terms of the statute.

The plaintiff here does not require any reformation of an instrument to make it conformable with the information given by him to the defendants' agent when effecting the

insurance, in order to enable the plaintiff to sue. He sues upon the defendants' deed, whereby they covenant to pay him all loss or damage occasioned by fire to the building insured, to the extent of \$1,000.

The defendants plead in bar, that by reason of certain conduct, which they contend constitutes the fraud, or misrepresentation, or false statement, or concealment of the plaintiff as to his title to the property insured, the policy has by its terms become avoided. The plaintiff replies in substance that he committed no fraud: that he was guilty of no misrepresentation, false statement, or concealment whatever: that he communicated everything scrupulously, truly, and correctly to the defendants' agent, who without the knowledge of the plaintiff failed to insert in the application, which he forwarded to the defendants, the plaintiff's answers correctly, as they were made to the agent; and so that what the defendants complain of as the misconduct of the plaintiff, was the misconduct or mistake of their own agent, in whom the plaintiff, being an illiterate man unable to read or write, reposed his trust, as a person held out by the defendants as competent to receive upon their behalf the plaintiff's application, and who might be relied upon to represent truly therein the answers which the plaintiff made verbally to the questions read to him from the application by the defendants' agent.

In short substance, the plaintiff replies, and insists, that it was the fault of the defendants, and not of the plaintiff, that the information, which the plaintiff gave correctly to the defendants' agent, setting forth the true state of plaintiff's title, is not stated in the policy.

The learned Judge having found this replication to be true, I think we should hold the matter to afford good reason upon equitable grounds for the interposition of the Court to prevent the defendants, under such circumstances, availing themselves of the defence set up in their plea; and that we may do this without impugning the authority of *Bleakley v. Niagara District Mutual Ins. Co.*, 16 Grant 198.

As to the plea of non-payment of an assessment within

the prescribed time, the learned Judge having found as a fact that the defendants failed to prove notice thereof to the plaintiff, it is unnecessary to decide whether or not the policy had become avoided at the time of the loss by fire, by reason of non-payment of the assessment, or whether or not the defendants were bound by their agent's verbal promise that the plaintiff's premium note should not be assessed for a year.

As to the second policy, namely, that declared upon in the second count, it appears to me the plaintiff must fail. The finding of the learned Judge, which affects the first policy, does not affect the second. That stands upon an wholly different footing.

The plaintiff in effecting it placed no special confidence in the defendants' agent. He effected that policy through the agency of his own son, who was able to read and write, and who signed the plaintiff's name to the application, and whose duty it was, before doing so, to see that the matters enquired about in the application were truly and correctly answered therein. And for his own agent's default the plaintiff must be responsible.

As I think that the vendor's lien for purchase money is an incumbrance upon the insured property, within the meaning of the question in that behalf, I am of opinion that the incorrect answer to that question does avoid this policy, both in the terms of the statute and of the policy itself.

The plaintiff, as to this policy, can derive no benefit from the fact that it was effected through the same agent of the defendants as he who effected the first, and who was then correctly informed by the plaintiff himself of the true state of the title.

Knowledge acquired in one transaction would not be notice in the other transaction, if this case turned upon the question of notice, but it does not.

It is not in any respect upon the doctrine of notice that we decide in the plaintiff's favour upon the first count. It is upon a higher principle of equity, namely, that in view

of the illiterate condition of the plaintiff, and of the defendants' agent having failed to state correctly in the application the answers which the plaintiff gave, and having procured him to sign it upon the belief that his answers were correctly stated, it would be a fraud in the eye of equity for the defendants to set up to the plaintiff's action, as a defence thereto, matter which may be more correctly described as the misconduct or mistake of the defendants than of the plaintiff.

As to the second policy, he must abide the consequences of his own agent having in his name signed a document upon which the assurance was effected, containing a misrepresentation upon a point which we think sufficient to avoid the policy.

At the trial there was no question raised as to the insufficiency of the evidence to prove the amount of the loss upon this policy.

The loss was, however, a total loss, and the defendants' agent who effected the policy stated that he considered the property was well worth the amount of risk taken by the company, and as the terms of the company are, as the agent well knew, not to take a risk to a greater amount than two-thirds of the value, we must take this evidence of the agent to mean that, in his opinion, the policy was not for an amount more than two-thirds of the value of the property insured.

The loss being total, the plaintiff is entitled to recover the full amount of the policy, less the premium note of \$120, and interest upon the difference from the expiration of three months from the loss—in all, \$932.

The verdict will be for the plaintiff on the first count, with \$932 damages, and for the defendants on the second count.

*Rule accordingly.*

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## JOHNSON V. THE PROVINCIAL INSURANCE COMPANY.

*Insurance—Premium—Payment by note—Authority of agent—Cancellation of insurance—Mailing—Evidence of.*

For the premium payable on an interim insurance on a stock of goods, instead of a cash payment, the agent received the note of the insured payable on the 1st of the next month, giving him a receipt as for cash. It was proved that, except in the case of farm risks, where notes might be received, for which there was a printed form on which this one was filled in, the agent had no authority to receive payment otherwise than in cash. *Semble*, that the company were not bound by the agent's act in accepting payment otherwise than as authorized.

By a memorandum on the note, the insurance became avoided if the note were not paid at maturity. The note, made on the 7th October, was payable on the 1st November. The plaintiff paid \$25.36 on account on the 27th October, the note being for \$40. The fire took place on that night. It appeared that the agent on the receipt of the notice from the company that they had cancelled the risk, wrote to the plaintiff, after the fire, but before the maturity of the note, returning him the note and the sum paid thereon, which the plaintiff retained, and did not afterwards pay or offer to pay the note.

*Held*, that the insurance was avoided, the premium never having been paid. By the terms of the interim receipt, it was provided that the directors should have power to cancel the contract at any time within thirty days, "by causing a notice to that effect to be mailed to the applicant," at a specified address. The general manager of the company proved that he directed a letter, declining, to be sent to the plaintiff: that he saw it written and placed with other letters to be sent; and that one H., a clerk in the office, had charge of them, and his duty was to address them to the parties and enter them in the mailing book. The mailing book was produced with an entry in it of this letter; and H. swore that this entry was in his writing, and that he had no reason to doubt that the letter had been mailed. The plaintiff (the insured), however, swore that he had never received it. *Per* HAGARTY, C. J.—On this evidence the question of mailing must have been submitted to the jury, who should have found that it had been mailed. *Per* GWYNNE, J.—A verdict finding otherwise could not have been sustained.

DECLARATION: Setting out a contract by the plaintiff with the defendants, through John Black their authorized agent, to insure him against fire, &c., for \$2,000: that such agent took and received from the plaintiff the premium then charged by the defendants for the insurance and gave the following receipt therefor, dated October 7th, 1874:

"Provincial Insurance Company of Canada.

"Head office, Toronto.

"PROVISIONAL RECEIPT, No. 740.

"Agent's office, Oct. 7, 1874.

"Received from Benjamin Johnson, of Marmora, (Post Office Marmora), the sum of forty dollars, being a premium

of an insurance to the extent of two thousand dollars on the property described in his application of this date, numbered 740: namely, a "stock of goods," subject, however to the approval of the Board of Directors in Toronto, who shall have power to cancel this contract at any time, within thirty days from this date, by causing a notice to that effect, to be mailed to the applicant to the above Post Office. And it is hereby mutually agreed, that unless this receipt be followed by a policy within the said thirty days from this date, the contract of insurance shall wholly cease and determine, and all liability on the part of the company shall be at an end. The non-delivery of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said Board of Directors. In either event, the premium will be returned on application to the local agent issuing this receipt, less the proportion chargeable for the time during which the said property was insured.

"\$40.00."

(Signed) "JOHN S. BLACK, Agent."

"N. B.—Any existing assurance on the property must be notified at the issuing of this receipt, or the contract is void.

"Please read this receipt in order to make yourself acquainted with its terms."

That afterwards, on the 27th of October, while the contract was in full force, the insured property was destroyed by fire, &c., with the usual averments.

The common counts, for money had and received, and interest were added.

Pleas: 1. Did not promise.

2. That the premium was not paid according to the contract, which was set out.

3. That within thirty days from the date of the receipt, namely, on the 19th of October, the defendants caused to be mailed at the Post Office, Toronto, a notice directed to the plaintiff cancelling said contract.

4. Traversing the loss.

5, 6, and 7, were on equitable grounds, and need not be referred to.

8. Never indebted.

The case was tried before Burton, J. A., and a jury, at Belleville, at the Spring Assizes of 1876.

It appeared that when this receipt was given by the agent Black no cash was paid, but the plaintiff gave a promissory note of that date, as follows:

Uniform note for farm premium.

Premium	\$
Agent's fee	\$
Total	\$40

Marmora, Oct. 7, 1874.

On the first day of November next, I promise to pay to the order of John S. Black, agent of the Provincial Ins. Co. of Canada, the sum of forty dollars, at the head office of the Provincial Ins. Co. of Canada, Toronto, Ont., value received, being for premium on the application for insurance to the amount of \$2,000 this day made.

(Signed.) BENJAMIN JOHNSTON.

And in case this note is not paid at maturity the policy to be issued to me will become void, although the holder of this note may proceed to collect the same.

The plaintiff swore that he paid \$25.36 on this note on the 27th of October, but the balance was never paid.

It appeared further that the fire happened after that day and before the 1st of November, viz.: on the night of the 27th of October: that the agent took the note in lieu of cash: that the agent told him he was insured on getting the receipt, and that it was customary to take notes.

The agent returned the note and the \$25.36 to the plaintiff after the fire, but before the maturity of the note.

The plaintiff did not notice that it was a note for a farm risk.

The agent Black said that he had no authority to take a note for an insurance of that kind: that in the case of farm risks, he was allowed to take notes for premiums, and he used, in this case, a blank printed form applicable to notes for farm risks. He did not tell the plaintiff he had no authority, but gave him to understand he was insured under the receipt. He did not call the plaintiff's attention

to the words "farm risk" on the note. He said he did not inform the company, that it was purely a matter between him and the assured.

The manager of the defendants' company, Mr. Harvey, proved that Black had no authority to take notes except for farm risks : that he had no power to grant policies, but only interim receipts : that when the plaintiff's application was received, enquiries were made, and on the 19th of October letters were written both to Black and the plaintiff declining the risk.

The letter to Black was produced, declining the risk, and directing him to "return premium, if paid, charging \$1 for time we have carried the risk."

Mr. Harvey said he directed the letters to be sent to the plaintiff and to Black. He saw them written and placed with other letters to be sent, and that Mr. Hays had charge of them, and his duty was to address them to the parties, and to enter them in the mailing book : that he had a distinct personal recollection of the letters being written from the circumstances of the refusal.

The mailing book was produced, and there was an entry there of the two letters, one addressed to Mr. Black, Belleville ; the other, to Mr. Johnston, Marmora.

It was on an ordinary form, declining risks. Opposite Johnson's name in the book, was written "declined."

*Hays* said it was his duty to keep the book : that the entry, "B. Johnson declined," was in his writing, and he had no doubt he acted in accordance with the entry : that the mail clerk posts a great many letters, sometimes fifty, more or less. "All I can say is from what I can see in the book. I might make a mistake, but I think it unlikely. They would be mailed separately, not with the whole lot. I remember mailing the one to Mr. Black. All but the declined ones generally remain over to the evening. Our practice with the declined letters is to mail them immediately." And again "I have no reason to doubt the letters were mailed."

The plaintiff was recalled, and swore he never received

the notice of the 19th of October, and that the first he heard was in Black's letter to him of the 31st of October, (produced.)

Black had been some days absent from home, and wrote on the 31st of October to the plaintiff, telling him on his return he found the letter of the 19th of October from the company declining his application, and that in accordance with instructions therein "I enclose you your note for \$40, being premium, together with \$25.36 sent on the 27th inst. to apply on same."

He said there was no other person in Marmora of his name.

The learned Judge directed a nonsuit, on the grounds: 1. That the premium was not paid by the giving of the note, but was never paid at all, as the cash and note were returned by the agent, and kept by the plaintiff. 2. That the mailing at Toronto cancelled the contract, and that it was consequently at an end before the fire; but he reserved leave to the plaintiff to move to enter a verdict in his favour for \$2,000 with interest from the 28th of October, 1874, in case the Court should be of opinion that the case should have been submitted to the jury."

In Easter term, May 17th, 1876, *Dickson* obtained a rule nisi to enter a verdict for the plaintiff, pursuant to the leave reserved.

In this term, February 9th, 1877, *Robinson*, Q. C., shewed cause. The agent had no authority to receive payment by note. His authority to receive notes, was limited to farm risks, and the plaintiff had notice of this, as the note itself shews it. At all events the note was never paid, and by its terms, if not paid at maturity, the insurance became void. The payment should have been in cash: *Walker v. Provincial Ins. Co.*, 7 Grant 137, 8 Grant 217; *Montreal Ins. Co. v. McGillivray*, 13 Moore P. C. 39. Assuming however that there was a valid insurance, the defendants cancelled it within the thirty days, namely, by writing a letter declining the risk and posting it. It is only necessary to

prove the posting and not its receipt; and it makes no difference that it never was in fact received: *McCann v. Waterloo Mutual Ins. Co.* 34 U. C. R. 376; *Shannon v. Hastings Mutual Ins. Co.*, 26 C. P. 380; *Bruce v. Gore District Mutual Ins. Co.*, 29 C. P. 267.

*Dickson*, contra. The plaintiff might reasonably assume from the usual course of dealing that the agent had authority to receive the note in question. The agent produces the note and gets the plaintiff to sign it, and does not tell him that his authority is limited to farm risks; and the plaintiff had no knowledge that it was so limited. The company, by authorizing their agent to receive notes in certain cases, and not notifying insurers that his authority was limited, must be assumed as holding the agent out to the world as having authority in all cases: *Schroder's Case*, L. R. 11 Eq. 131. The case of *Montreal Ins. Co. v. McGillivray*, 13 Moore P. C. 87, is strongly in the plaintiff's favour. There it is said, at p. 121, that the acts of the agent will bind the company when they are within the scope of his general and ostensible authority, though they may exceed his actual authority as between himself and the company. Then as to the rejection of the risk. The evidence was very weak as to the letter having been mailed to the plaintiff, and the fact of its not being received is strong corroborative proof of its never having been mailed. At all events, it lies on the company to prove its receipt: *McCann v. Waterloo Mutual Ins. Co.*, 34 U. C. R. 376. It also should have been proved that the letter was not only addressed to, but mailed to the plaintiff at Marmora.

March 9th, 1877. HAGARTY, C. J.—There seems to be a great difficulty on the plaintiff's part in meeting the second plea, that the premium was not paid.

Even if we assume that the agent had the right to take the plaintiff's note, payable on the 1st of November, as cash, the amount has never in fact been paid or tendered to the defendants or to Black.

On the 27th of October he sent a part payment of \$25.36 to the agent. That night the premises were burned. On the 31st of October, the agent, in pursuance of his instructions from the head office, during the currency of the note, returned it to him with the amount of cash which he had sent on the 27th of October, informing him of his risk having been declined.

This letter was produced by the plaintiff at the trial with the note, his name as maker being struck out. It does not appear by whom.

He had, it seems, addressed a letter to Black, the agent, dated the 28th of October, informing him of the property having been burnt the preceding night. So that when the note matured it was dishonoured, and payment has never been made or offered. The note was payable on the 1st of November, and would mature on the 4th of November. The plaintiff had apparently time to pay, or at least to offer to pay his note, which he insists represented his cash premium.

It would be observed that at the foot of the note is the printed memorandum, that "in case this note is not paid at maturity the policy to be issued to me will become void, although the holder of this note may proceed to collect the same."

When informed of the declining of the risk, he knew that there was a rescission of the contract, so far as defendants could rescind it.

Retaining the cash, and the unpaid note, still current, would, in any ordinary case, be considered as an acquiescence in the rescission.

He may urge that as the fire had occurred in the meantime, it was useless for him to do more. But if he insist on holding the defendants to an interim insurance, he must perform his part of the bargain, even as he construes it, and he could only do so by payment or tender of payment within the time agreed on.

The note is payable to the order of Black *at the head office in Toronto*. Black has never endorsed the note, and it was always, as we must consider, in Black's possession.

When the loss occurred, on the 27th of October, the premium was certainly unpaid, and when the note fell due, the 1st or 4th of November, when it should have been paid, it was not paid, and we can see no evidence that the plaintiff ever tried to pay it, or, if payment had been refused, had formally tendered payment. So that he has never performed his part of the contract either in the letter or the spirit, even accepting the contract to be binding in the sense urged by him.

On this ground alone the plaintiff seems to fail.

We are hardly prepared to hold that, on the evidence before us, the defendants are necessarily bound by the unauthorized act of their local agent in taking anything but cash for the premium on this risk.

Every man may be naturally supposed to know that for an ordinary insurance on a mercantile stock he must pay the premium in cash. Such is the general rule. He may know that on a mutual risk a premium note is given. It also appears that, on what are called "farm risks," notes are taken. But when he takes a receipt as for so much cash, contrary, as he knows, to the truth, as he paid no cash, we may with reason hold that the plaintiff must take the risk of the agent having authority to give him credit on his note.

There is no reason to impute any fraudulent conduct to the agent. For some reason or other, not so clearly appearing on this trial as on the former, the agent made this arrangement with the plaintiff, taking his note instead of cash.

A reference to the report of this case, 26 C. P. 113, will shew how much less effective in eliciting information on this head was the last as compared with the first examination of the agent.

We have of course to base our present judgment on the evidence on this trial.

We have expressed our opinion in a case this term, *Chatillon v. Canadian Mutual Ins. Co. (a)*, how an equity

may well arise against a company, when their agent himself frames a representation for a wholly illiterate man, contrary to the statements truly made to him by such person, and in other cases the subject is discussed.

But we fail to see any reason for exonerating the plaintiff here from all risk of the agent having exceeded his authority.

He is not without remedy. If this agent can be proved to have deceived him to his damage, as to the extent of his (the agent's) authority, we may presume the latter is liable therefor, on the principle of such cases as *Randall v. Trimmen*, 18 C. B. 786; *Collen v. Wright*, 7 E. & B. 301, 8 E. & B. 647; *Eckstein v. Whitehead*, 10 C. P. 70; *Johnston v. Barker*, 20 C. P. 228.

We think that the nonsuit is right on the first ground.

Speaking for myself, I entertain a strong opinion that if the defence rested on the writing of the notice to the plaintiff declining the risk on the 19th of October, it would have been necessary to have submitted that issue to the jury.

The defendants' case, was that the notice had been mailed in due course of business to the proper address. It was not sworn to as an independent fact proved by the personal recollection of the person mailing it. The plaintiff swore that it never reached him.

This of course did not prove that it was not mailed, and mailing would be quite sufficient.

But when certain facts are stated from which it is asked to be proved that the letter was mailed, it cannot be irrelevant to the decision, as an element in the discussion, that, at all events, it never reached its destination.

If on the jury, I should have at once found that the letter was mailed.

On the point of leaving questions to the jury, and the nice distinctions between *no* evidence in the view of the Court, and evidence on which the jury must pass an opinion, I may refer to *Brydges v. Directors, &c., of North London R. W. Co.*, L. R. 7 H. L. 213, and the lucid

analysis of the law in the opinion of Brett, J., now Lord Justice. It will well repay perusal.

I also refer to *Robson v. North Eastern R. W. Co.*, L. R. 2 Q. B. D. 85, in which the same very learned Judge, at p. 89, speaks of this last case in the Lords, as one that "puts an end to a long controversy, not as to the law, but as to the mode of dealing with these cases."

See also a very important case of *Milissich v. Lloyds*, noticed in Weekly Notes, February 17th, 1877, at p. 36, in appeal from the common law division. I have the report at length in the "Times" of February the 12th, 1877, where the distinction between what the Judge may decide and what must be left to the jury is noticed.

I think the plaintiff's rule should be discharged.

GWYNNE, J.—I concur in thinking that the nonsuit must be sustained, upon the ground that the plaintiff never paid the premium.

There is nothing in the evidence which would justify us in holding the defendants bound by the note which the agent took payable to himself, and which he had no authority from the defendants to take. There is nothing in the evidence of the nature of that upon which we proceeded this term in *Chatillon v. Canada Mutual Ins. Co.* The memorandum attached to the note expressly stated that the policy, even if granted, should be void, unless the note should be paid at maturity, even though the holder should proceed to collect the same; and the note never was paid at maturity. The plaintiff also having received back the note, and the amount which he transmitted to the agent on account, on the day of the fire, seems to shew that the plaintiff understood that the transaction was a private arrangement between him and the agent. But however that may be, the premium in fact never was paid. The agent was not authorized to receive the note as payment, and I cannot see anything which in equity could hold the defendants bound by the fact of the agent having taken it.

See *Fowler v. Scottish Equitable Ins. Co.*, 4 Jur. N.S. 1169.

As to the other point, namely, whether the notice declining the insurance was mailed to the plaintiff or not, I confess that, although I am of opinion that the nonpayment of the premium is sufficient to support the nonsuit, I cannot very well see how a verdict finding that the letter had not been mailed, could have been sustained upon the evidence.

Where a large number of letters are daily mailed in the course of a large business, it would be almost impossible to prove the mailing of any particular letter upon any particular day, after a lapse of months, if the evidence given in this case was insufficient for the purpose, or if against such evidence a jury might arbitrarily find that none was mailed merely because the party interested in establishing that it was not should deny its receipt.

GALT, J., concurred.

*Rule discharged.*

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## CAMERON ET UX. V. WAIT.

*Highways—Road laid out by Quarter Sessions—Right to original allowance—50 Geo. III. ch. 1., 4 Geo. IV. ch. 10, Municipal Acts—Construction of.*

The plaintiff claimed in right of his wife, under a deed to her, dated 7th October, 1867, of the south half of lot nine, in the fifth concession of Haldimand, to be entitled to the original allowance for road between lots eight and nine, by reason of the Justices of the Quarter Sessions having in 1837 laid out a road across this south half in lieu, as was claimed, of the original allowance. In proof thereof, the report of the then surveyor was produced, dated 15th July, 1837, addressed to the Justices reciting the petition of twelve freeholders for the new road, with his certificate of his having examined and surveyed it and given notice according to law; the road to be 50 feet wide. He also certified as to his having examined the original allowance and found it impracticable by reason of bad hills and swamps, while the new road was good. On the back of the report was endorsed the minute of the Quarter Session thereupon, namely, "Read and opposed and confirmed, this 18th July, 1837," &c., which, with the user, &c., of the road as a highway, was the only evidence of their action in the matter. The road was proved to be 40 feet wide, while the allowance was 60 feet. In April, 1865, the owner of lot No. 9, amongst others, petitioned for the passing of a by-law to open up this allowance; and evidence was offered and rejected that the then owner of lot nine was also owner when the new road was opened. In March, 1866, a by-law was passed opening up this allowance; and the owner of lot nine, then moved his fence to the limit of the allowance. In November, 1875, another by-law was passed repealing the previous by-law, but without expressing it to be for the purpose of closing up this road allowance.

*Held*, that the plaintiff acquired no right to the original allowance under 50 Geo. III. ch. 1, and 4 Geo. IV. ch. 10, under which the new road, if legally laid out at all, was laid out, and under which he must be assumed to have received compensation, or to have released or discharged his claim therefor; nor under the 20 Vic. ch. 69, or the subsequent Municipal Acts identical therewith; or at all events they did not apply to a road opened up by the Quarter Sessions, not in lieu of the original allowance, but as a new road, which its course and its not being of the same width as the old road was evidence of, or to such road, not opened up by the owner himself, but by authority against his will, or by his consent, without any claim for compensation.

*Quære*, whether the owner at the time the new road was opened, was not the only person, if any there was, entitled to a conveyance, and whether his right would pass by a mere conveyance of the lot.

*Held*, also, that it was a condition precedent to the granting of such conveyance that the old road should be useless, whereas the passing a by-law to open it up was evidence to the contrary.

*Held*, also, that the evidence that the owner of lot nine had in 1865

petitioned for the opening up of the old road allowance, was admissible.

*Held*, also, that the by-law passed in November, 1875, repealing the previous by-law did not operate as a by-law for closing up the allowance.

*Held*, also, that, even if entitled to a conveyance, the plaintiff could not claim without one under the statute.

The various statutes upon the subject reviewed.

DECLARATION. First count: trespass to certain land described as the east half of lot No. 9, in the 5th concession of the township of Haldimand.

Second count: trespass to land of the plaintiff described as lying to the east of the said lot No. 9, and as extending for the whole length of that lot, of a width of sixty feet, and for breaking down the fence thereof, and depasturing it with cattle.

Third count: for breaking down, carrying away, and converting to the defendant's use the rails and posts of the plaintiff's said lands.

Pleas.

1. To first count: not guilty.

To second count:

2. So far as it alleges a trespass to the land extending from the centre to the rear of the 5th concession, not guilty.

3. So far as it alleges a trespass to the land extending from the front to the centre of said concession, not guilty.

4. So far as it alleges a trespass to the said last mentioned land, that at the time of the alleged trespass the plaintiff was not in the actual or exclusive possession thereof.

5. So far as it alleges a trespass to said last mentioned land, that said land was an original road allowance vested in the corporation of the township of Haldimand, and there was and of right ought to have been a common and public highway over the same for all persons, &c., and the alleged trespass was a user by the defendant of the said road allowance.

6. So far as it alleges a trespass to the last mentioned land, and so far as the same charges a trespass to the fences, alleging, as before, that it was a public highway, &c., and that defendant, having occasion to use the said way, pulled down the fences and posts which were obstructing it.

To the third count:

7. Not guilty.

8. So far as it alleged a trespass to the fences, &c., not guilty.

9. Also so far as it alleged a trespass to fences, &c., alleging, as before, that it was a public highway, &c., and desiring to use the said highway, and because the said fences, &c., obstructed it, the defendant necessarily pulled them down, doing no unnecessary damage, &c.

The plaintiff joined issue on the first, third, fourth, fifth, sixth, seventh, eighth, and ninth pleas. He entered a *nolle prosequi* as to half the close mentioned in the second plea.

As to the fifth, sixth, and ninth pleas: the plaintiff new assigned, that he sued not only for the trespasses in those pleas respectively admitted, but also for trespasses committed by the defendant to a greater extent and for a longer period than was necessary upon the occasion referred to in the said pleas.

Rejoinder: not guilty.

The defendant further pleaded to the second count, as to the land extending from the front to the rear of the concession, that the land was not the plaintiff's.

Issue.

The cause was tried before Patterson, J. A., without a jury, at Cobourg, at the Fall Assizes of 1876.

The act of trespass complained of by the plaintiff was the taking down by the defendant of a fence recently erected by the plaintiff across an original allowance for road between lots 8 and 9 in the 5th concession of the township of Haldimand, at its point of intersection with a road opened, as was said, by the Quarter Sessions of the county

in 1837, across the southerly halves of lots Nos. 9, 8, and 7, in the said fifth concession.

The evidence of this road having been laid out by the Quarter Sessions in 1837, consisted of a report, which was produced, signed by Benjamin Ewing, surveyor of roads for the county of Northumberland, dated 10th July, 1837, and addressed to the Justices in General Quarter Sessions of the Peace assembled.

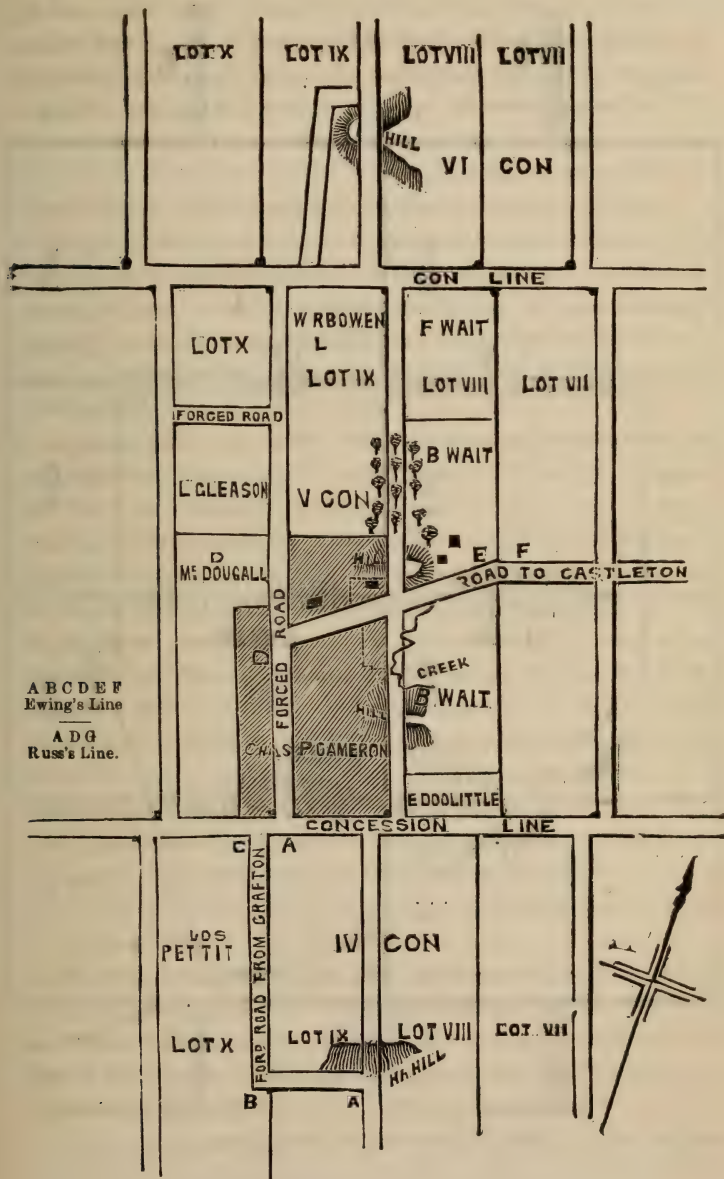
This report recited that twelve freeholders of the township of Haldimand had applied to him (Ewing) by their petition to have a new line of road laid out and opened, commencing on the limits between lots 8 and 9 in the fourth concession of Haldimand, at a stake marked opposite Gleason's barn. By a plan produced in evidence (a copy of which will be found on the opposite page), this point of commencement appeared to be situate upon the south half of lot 9, in the 4th concession—Then south, seventy-four degrees west, eight rods, to the limit between lots 9 and 10: then north,  $16^{\circ}$  west, to the front of the 5th concession: then on the limits between lots 9 and 10 in the 5th concession, till opposite Benjamin Purdy's house—this point was shewn upon the map produced to be about 11 chains south of the centre of lots 9 and 10—then north,  $60^{\circ}$  east, one hundred and eight rods: then east, forty-two rods: then south  $70^{\circ}$  east, one hundred and two rods, to the Percy road on lot 7, in the 5th concession.

The surveyor at the foot of this description subscribed:

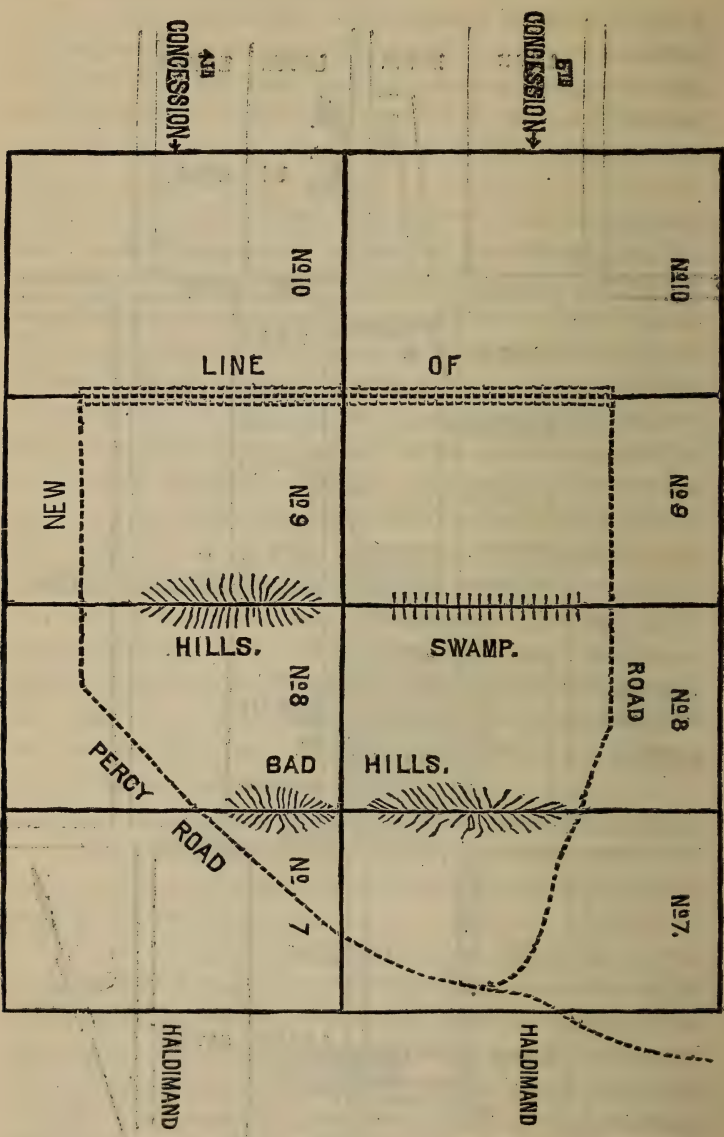
"I have examined and surveyed the above road, and given notice of the same as the law directs, said road to be fifty feet wide."

By a sketch upon the back of this report (a copy of which will be found on p. 480), the Percy road, the origin of which did not appear, was a road leading from the point of commencement of the road described in the report, in an easterly and north-easterly direction, across lots 8 and 7 in the 4th concession, lots 7 and 6 in the 5th concession, and so on, to what terminus did not appear.

The following is the plan referred to on p. 478:—



The following is the sketch referred to on p. 478:



At the foot of this sketch was the following certificate signed by Mr. Ewing: "I have examined the allowance for road between lots 9 and 10." (By which it is said and admitted he must have meant, 8 and 9 in the 4th and 5th concessions of Haldimand), "and find the land not practicable for a road, by reason of bad hills and swamps. The new line is good land for a road, and there is no objection to the new line, as I know of. The line in the limits in the 4th and 5th concessions to be the centre of the road.'

Upon the back of this report, which was produced from the office of the treasurer of the county of Northumberland, was endorsed the following minute of proceedings of the Quarter Sessions thereupon:—"Read and opposed and confirmed, this 18th July, 1837, John Steele, Chairman, Q. Sessions."

This and the use of the road was the only evidence of the action taken by the Quarter Sessions upon the above report. And by a certificate of one Russ, the road surveyor, dated the 31st May, 1873, upon which the plaintiff relied as part of the evidence entitling him to a grant and conveyance of the old road allowance between lots 8 and 9 in the 5th concession south of its intersection with the new road as opened in 1837, it appeared that this new road, although by Ewing's report, made in 1837, designed to be 50 feet wide, was only in 1873 40 feet wide, whereas the old road allowance between lots 8 and 9 was intended to be 60 feet in width at least.

It appeared that in April, 1865, the defendant and others petitioned the municipal council of the township to open by by-law the road between the south halves of these lots.

Evidence was offered by the defendant that the person who was the owner of the south half of lot No. 9 when the new road was laid out upon it, was still owner when the petition was presented, and signed this petition. The learned Judge refused to receive this evidence.

It also appeared that the municipal council in March, 1866, passed a by-law for opening up this side line between the

south halves of lots 8 and 9, reciting therein that it was necessary and expedient to do so.

Upon the passing of this by-law the road was opened in virtue thereof, and the defendant and the then owner of lot No. 9 moved their fences, which before had crossed the side line, and placed them along their respective sides of the road allowance.

It also appeared that in November, 1875, the corporation passed a by-law to repeal the previous by-law, but without stating that it was for the purpose of closing up the road allowance.

The plaintiffs claimed the south half of the lot under a deed from Joseph Pettit to the plaintiff's wife in fee, dated 7th October, 1867.

The learned Judge entered a verdict for the plaintiff.

In Michaelmas term, November 22nd, 1876, *J. W. Kerr* (Cobourg), obtained a rule *nisi* under the Law Reform Act, to set aside the verdict for the plaintiff and to enter a verdict for the defendant.

In the same term, November 30th, 1876, *Richards*, Q. C., shewed cause. The learned Judge has found that the road across the plaintiff's land was opened up in lieu of the original road allowance under 50 Geo. III., ch. 1, and 4 Geo. IV., ch. 10, and without the plaintiff having received any compensation therefor. The presumption is, that it was properly laid out. The old road therefore became vested in the plaintiff. However, under sec. 332 of the Consol. Stat. U. C., ch. 54, which is similar to sec. 334 of the Act of 1866, and to sec. 426 of the Act of 1873, the plaintiff is entitled to such road allowance, and to a conveyance thereof from the municipality. The municipality had no power to pass the by-law opening up the allowance. The 331st section does not apply to cases where, as here, a new road has been substituted for the old allowance. At all events, the municipality by a subsequent by-law repealed this by-law: *Winter v. Keown*, 22 U. C. R. 341; *Regina v. Great Western R. W. Co.*, 32 U. C. R. 506; *Re Lawrence and*

*Corporation of Thurlow*, 33 U. C. R. 223; *Re Burritt and Corporation of Marlborough*, 29 U. C. R. 119; *Brownlow v. Tomlinson*, 1 M. & G. 484.

*Bethune*, Q. C., and *J. W. Kerr* (of Cobourg) contra. The plaintiffs' right, if any, to the old allowance, can only arise under the 50 Geo. III. ch. 1, and 4 Geo. IV. ch. 10. There is no right under these Acts. There is no evidence that the new road was ever legally opened. It appears to have been opposed, and there is no evidence that it was confirmed as directed by the statute. If, however, it was legally opened, then the presumption is, that the owner either received compensation or released and discharged his claim therefor. Also, it is not proved that the old road was unnecessary for a public highway. The new road was not in substitution of the old road allowance, but was intended as a new road. The fact of its being 40 feet wide, whereas the old road was 60 feet, shews this, for the 4th sec. of 4 Geo. IV., ch. 10, required the substituted road to be of the same width as the old one. There is no right under the subsequent Acts. The Act 20 Vic. ch. 69, and the subsequent Municipal Acts are not retrospective, and they do not, apply to a road opened up by the Quarter Sessions, or where the land is given up voluntarily by the owner himself. At all events it should have been shewn that the road was useless. Moreover, there should have been a by-law closing up the old road allowance. That allowance therefore remained in the municipality, and they had the right to pass the by-law to open it. The evidence of the plaintiff having signed the petition should have been admitted, as it shews that he did not consider he had any claim to the allowance. The subsequent by-law is inoperative, as it is not stated to be for the express purpose of closing up the road allowance. Even if the subsequent Acts do apply it is a matter of discretion, whether the municipality should grant a conveyance or not, and, at all events, the only person entitled to a conveyance is the person who owned the land at the time the new road was made: *Winter v. Keown*, 22 U. C. R. 341; *Re Lawrence and Corporation of Thurlow*,

33 U. C. R. 223; *Regina v. Great Western R. W. Co.*, 32 U. C. R. 506; *Purdy v. Farley*, 10 U. C. R. 545.

February 5th, 1877. GWYNNE, J.—I am not surprised that the learned Judge who tried this case should have expressed the hope that some means might be open on taxation to correct the gross abuse of the license of pleading which this record presents.

The plaintiff declares in his first count for a trespass upon a specified piece of land, described as being the east half of lot No. 9 in the 5th concession of the township of Haldimand.

In a second count he declares for trespass upon land of the plaintiff, described as lying to the east of the said lot No. 9, and as extending for the whole length of that lot of a width of sixty feet, and for breaking down the fences thereof and depasturing with cattle.

To these he adds a third count for breaking down, carrying away, and converting to the defendants use the rails and posts of the plaintiff's said lands.

To this declaration the defendant pleads no less than nine pleas, five of which, by a singular process of division, have been made to assume the shape of not guilty, while the whole matter of defence could and should have been set up in one plea of not guilty, and one plea of justification of the nature asserted in the fifth plea, whereas for the purpose of raising this justification no less than three pleas are pleaded.

The plaintiff then, as to half of the close described in his second count enters a *nolle prosequi*, and as to the other half, to which the plea of justification applies, namely, that the *locus in quo* is a common public highway, being an original road allowance vested in the corporation of the township of Haldimand, and that the alleged trespass consisted in the lawful user by the defendant of said road allowance, the plaintiff, besides taking issue, new assigns for excess, as follows: "That he sues, not only for the trespasses in the plea admitted, but also for trespasses committed by the

defendant to a greater extent and for a longer time than was necessary upon the occasions referred to in the plea."

In substance the plea sets up that the *locus in quo* is not the plaintiff's land at all, but, on the contrary, a common public highway, and the defendant justifies the entry there-upon in the rightful user by the defendant of the highway, which he avers is what the plaintiff has in his count complained of as a trespass upon *his* land.

The plaintiff replies and new assigns excess, as if the plea justified a part only of a single continuing act of trespass alleged in the count :—as if it confessed an entry upon the plaintiff's land for some partial or temporary legal purpose, which purpose did not justify the whole extent of the trespass complained of in the count.

The effect of taking issue upon the plea, coupled with this new assignment for excess only, not in assertion of a trespass *alio loco*, namely, on the plaintiff's land, is as if the plaintiff should say, the *locus in quo* is not a public highway as the defendant alleges ; but even if it be, the defendant is liable to the plaintiff for excess, namely, in using the road or highway to a greater extent than was necessary upon the occasion of his using it.

This mode of replying to such a plea as the defendant's fifth plea, is wholly bad.

The defendant, however, pleads not guilty to the new assignment, upon which issue is joined, presenting for trial what appears to me to be a singular issue, namely, whether in the rightful user of a common highway a person can be said to exercise his right of user to a greater extent than necessary, so as to give to a stranger an action as if for a trespass upon *his close*.

The point really in contest, and to try which this action was brought, was, that by reason of the opening of another road, as was alleged, in lieu of the original road allowance mentioned in the plea, the latter, although not conveyed to the plaintiff by the municipality, has become, as the plaintiff contends that under the circumstances existing it has become, his property in virtue of the provisions of a

statute which the plaintiff relies upon as passing to him the estate in the road allowance as his own private property.

To raise this question properly the replication to a plea justifying the acts complained of as having been done in the rightful user of an original allowance for road should, in my judgment, set out the facts upon the existence of which the plaintiff insists as bringing into operation the clause of the statute upon which he relies. Then would have been raised properly the questions which have been argued before us, namely—1. Whether the operation of the statute upon which the plaintiff relies, under the circumstances appearing in evidence, is to vest the original road allowance in the plaintiff as his property without a deed from the municipality conveying it to him; and 2. Whether, under the circumstances appearing, the municipality has the power to convey the road in question to the plaintiff, or to any one, without first passing a by-law to close it; and 3. Whether, under the circumstances appearing, the municipality has power to close the road, even by a by-law.

By 4 Geo. IV. ch. 10, sec. 3, it was enacted, "That when any road now or hereafter established shall be altered, it shall not be lawful for the surveyor of roads reporting such alteration to lay out such new road of a less width than the one proposed to be altered."

And by the 6th section it is enacted, "That in all cases when application shall be made to any surveyor or surveyors of highways, to have any new road laid out, or any road already laid out altered, those making the application (after a sale of the old road so altered shall have taken place, and the proceeds of such sale been paid over to the owner of the land through which the new road may pass,) shall be deemed liable to pay any further sum which shall be ascertained by a jury in the manner as by the laws now in force is directed; and in case the owner or owners, agent or agents thereof shall, within three months from the date of the report of such new road, or the alteration of such road or roads, make application to be compensated for the land taken for the same, in manner as by

the laws now in force is directed, no order shall issue directing statute labour thereon, unless a discharge or acquittal for the same," that is, apparently, for the compensation, "or a release for the land taken for such purpose from the owner or owners thereof, or proof of a tender having been made of the value thereof, so ascertained, be produced to the General Quarter Sessions: Provided, nevertheless, that nothing in the Act contained shall extend or be construed to extend, to prevent the said justices of the peace from directing the same to be paid out of the public money of the district, if to them it shall appear that the said alteration is of manifest utility to the public at large, and not of a local nature."

Now, the mode of ascertaining the compensation referred to in the above section is to be found in 50 Geo. III. ch. 1, sec. 3, by which it is enacted, that upon application in writing being made to any surveyor by twelve freeholders of any county or riding, stating that any public highway or road in the neighbourhood of the said freeholders now in use is inconvenient, and may be altered so as better to accommodate His Majesty's subjects and others travelling thereon, or that it is necessary to open a new highway or road, it shall and may be lawful for such surveyor, and he is hereby required, to examine the same, and report thereon in writing to the justices at their next ensuing Quarter Sessions, describing particularly the alteration intended to be made, or new highway or road to be opened, giving at the same time public notice thereof, by affixing, or causing to be affixed, a copy of the said report in two or more of the most public places next adjacent to the place where the said alteration is intended to be made, or new highway or road to be opened; and if no opposition, as hereinafter mentioned, should be made to such report, it shall be lawful for the said justices, or the major part of them, and they are thereby required, to confirm the said report, and to direct such alteration to be made, or such new highway or road to be opened accordingly. And when any application should be made to the said

justices in opposition to the said report, they were required to have a jury of twelve disinterested men to be empannelled, who after hearing evidence touching the said intended alteration, or new highway or road, should, upon their oath, either confirm or annul the said report, or so alter and modify the same as the exigency of the case may appear to require, and their verdict shall be final, and the justices shall direct such highway or road to be altered or opened accordingly.

Then the 9th section of 50 Geo. III., ch. 1, authorized the surveyor of highways, in all cases when it should be found necessary to alter the direction of any highway or road already laid out, so that the land through which it formerly passed should become unnecessary for a public highway, to sell such land, and to grant the same under his hand and seal to any purchaser, which sale and grant should convey a legal title to such purchaser: Provided, however, that if the owner or owners of the land through which such new road might pass should be willing to accept the old road as a compensation, such owner or owners should and might take the same by a conveyance under the hand and seal of the surveyor as aforesaid, which he was thereby authorized to give.

This section was absolutely repealed, as affecting future transactions, by 4 Geo. IV. ch. 10, sec. 7, in so far as regards government appropriations for highways, for the reason that, as there recited, much inconvenience had arisen by the sale of portions of the original government appropriations and allowances for roads. The 4 Geo. IV., ch. 10, not having provided any other mode for selling government allowances for roads in substitution for the repealed 9th sec. of 50 Geo. III. ch. 1, the words in the 6th sec. of 4 Geo. IV. ch. 10, "After sale of the old road so altered shall have taken place," and the proceeds of such sale paid over to the owner of the land through which such new road passes, must, I apprehend, be construed as applying to *old roads* other than original government appropriations and allowances, as to which, upon the passing of 4 Geo. IV.

ch. 10, there was no person or persons competent to sell or convey them to any one.

It appearing then by the minute signed by the chairman of the Quarter Sessions, dated the 18th July, 1837, endorsed upon the surveyor of roads' report, of the 10th July, 1837, that the surveyor of roads' report was opposed and confirmed on the said 18th July, 1837, we must conclude that, either the new road was not legally opened by authority of the justices of the peace in Quarter Sessions, although by user and the application of statute labour it may have since become, and no doubt is now, a public highway, or else that it was, although opposed, duly confirmed as a road in accordance with the provisions of the 6th sec. of 4 Geo. IV. ch. 10, and that therefore the owners of the land through which the new road runs, either gave an acquittal or discharge for all compensation or released the land taken for the new road, either without any compensation or upon receipt of compensation accorded to them in the terms of the provisions of the 6th section of the statute.

I can see nothing in the Acts then, (that is in 1837) in force, which could prevent parties from surrendering their land for a new road, freed and discharged of all claim for compensation therefor, and, if they should be unwilling to do so, the Act provided that their claim for compensation should be asserted against those making application for a new road in the manner provided by the 6th section.

Whether, therefore, this new road was opened without the authority of the Quarter Sessions, or in virtue of the authority of the Quarter Sessions in that behalf obtained by due process of law in the manner described by 4 Geo. IV. ch. 10, under which, in connection with 50 Geo. III. ch. 1, this road must be held to have been laid out, if at all laid out by authority of Quarter Sessions, the owner of the south half of lot No. 9 in the 5th concession, of which lot the plaintiff's wife, is now seized by a conveyance executed in October 1867, had no claim whatever upon the opening of the road, nor at any time since, to have the original road allowance between lots 8 and 9, or any part

thereof, conveyed to him, unless he became so entitled by 20 Vic. ch. 69, or some subsequent Act.

By the 187th section of the Municipal Corporations Act of 1849, 12 Vic. ch. 81, the municipal councils of townships and counties were expressly restrained from passing any by-law for stopping up any original allowance for roads in any township or county.

This restriction remained in force until the passing of the Act 20 Vic. ch. 69, by which Act the restriction was repealed, and it was enacted by the 2nd section of the Act, that it should be lawful for the municipality of each township from time to time to pass by-laws for the stopping up and sale of any original allowance for road within such township, and thereby to determine and declare the terms upon which such original allowance for road should be sold and conveyed. Provided always that such by-law, before having any force, should be confirmed by a by-law of the county in which such township was situate.

By the 4th section it was enacted that in all cases where a public road had been opened or where a new road should be opened in lieu of the original road allowance, and for which compensation should have been or should be paid, the municipal council of the township should have power to sell such original road allowance to the party or parties next adjoining to whose land or lands the same shall have run or be run, and in case of his refusal to become the purchaser thereof at such price as such municipal corporation should think reasonable, then to any other person or persons whomsoever, but not for a less sum than the price it was offered for to the party refusing to purchase it.

And by the 5th section it was enacted that in all cases where a public road had been opened, or where a new road should be opened in lieu of an original road allowance, and for which no compensation had been or should be paid, the municipal council of the township should have power, and they were thereby authorized and required upon the report in writing of the township surveyor, or of a deputy provincial land surveyor, that such new road allowance or

travelled road was sufficient for the purposes of a public road or highway, to convey such original allowance to the party or parties *through* whose land or lands the same should have run or should run, in lieu of such new road.

And the 6th section enacted that "When any such road," (that is any original allowance for road in lieu of which a new road is opened without compensation)," is, in the opinion of such municipality, useless to the public, and lies *between* lands *owned by different parties*, such municipality shall, subject to the conditions aforesaid," that is, subject to the conditions, as I read the Act, that the substituted road was laid out without compensation, and that the report in writing as to the sufficiency of the new road should be supplied by the surveyor, "sell and convey a part thereof," that is, of the original allowance, "to each of such parties," namely, the parties owning land on either side of the original allowance "as to such municipality shall appear to be just and reasonable."

Then by the 7th section the municipalities were in express terms restrained from closing up any public road or highway, whether an original road allowance or a road which had been opened by the Quarter Sessions, county or township councils, through any land, by which any person shall be excluded from ingress or egress to and from his farm or place of residence over the said road, but all such roads shall remain open for the use of the person who shall require the same.

This Act of 20 Vic. ch. 69, was repealed by the Municipal Institutions Act of 1858, 22 Vic. ch. 99; by the 305th section of which provision was made identical with that of the 7th section of the repealed Act, 20 Vic. ch. 69, and by the 310th section it was enacted that every council should make to the owners of real property entered upon, taken or used by the corporation in the exercise of its powers in respect to roads, streets, and other public communications, &c., due compensation for any damages necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work.

Sections 311 and 312 provide for having an arbitration to determine the amount of compensation. A similar provision had been enacted in the Act of 1849, 12 Vic. ch. 81, which Act was repealed also by the Act of 1858.

Then the 317th section of the Act of 1858, sub-sec. 6, enacted, that the council of every township, county, city, town, and incorporated village might pass by-laws for, among other things, opening, making, preserving, improving, stopping up, &c., roads, streets, or other public communications, &c., and for entering upon, taking, or using any land in any way necessary or convenient for the said purposes, subject to the restriction in the Act contained.

And by sub-sec. 11 of the same 317th section provision was made similar to that contained in the 4th section of 20 Vic. ch. 69.

And by the 318th section provision was made, in substitution for sections 5 and 6 of 20 Vic. ch. 69, as follows:—  
“In case any one in possession of a concession road or side line has laid out and opened a road or street in place thereof without receiving compensation therefor, or in case a new or travelled public road has been laid out and opened in lieu of an original allowance for road, and for which no compensation has been paid to the owner of the land appropriated as a public road in place of such original allowance, the owner,” that is of the land so appropriated, “if his *lands* adjoin the concession road, side line, or original allowance, shall be entitled thereto, in lieu of the road so laid out, and the council of the municipality, upon the report in writing of its surveyor, or of a deputy provincial land surveyor, that such new or travelled road is sufficient for the purposes of a public highway, may convey the said original allowance for road in fee simple to the person or persons upon whose land the new road runs, and when any *such* original allowance”—that is any such allowance for road in lieu of which another road has been made upon the land of an adjoining owner,—“is, in the opinion of the council, useless to the public, and lies *between lands owned by different parties*, the municipal council

may, subject to the conditions aforesaid,"—that is to say, subject to the condition that a new road in lieu thereof has been laid out without compensation therefor, which new road has been reported sufficient by a surveyor,—“sell and convey a part thereof to each of such parties, as may seem just and reasonable; and in case compensation was not paid for the new road, and the person through whose land the same passes does not own the land adjoining to the original road allowance, the amount received from the purchaser of the corresponding part of the road allowance, when sold, shall be paid to the person who at the time of sale owns the land through which the new road passes.”

The 188th section of the Act of 1849, 12 Vic. ch. 81, had provided that: “In case the person or persons *now*,” that is at the time of the passing of the first municipal Act, “in possession of any concession road or side line, may have laid out streets in any city, town or village without any compensation therefor, he shall be entitled to retain the land within such city, town, or village, originally set apart for such concession road or side line in lieu of the street *set apart by him* in place of the said concession road or side line.”

When the Legislature by section 5 of 20 Vic. ch. 69, applied this provision to original allowances in townships, they expressly say that the original allowance should be conveyed to the party “*through whose lands the same*,”—that is, the original road allowance,—“shall have run or shall run, in lieu of such new road.”

From the use of this expression “*through whose lands*,” it would seem that what was in the contemplation of the Legislature then was, that no one should be entitled to have the original road allowance conveyed to him, unless a person owning lands on both sides of the original road allowance so directed to be conveyed to him. This would most probably be the position of persons laying out streets in cities, towns, or villages, in lieu of an original road allowance, which latter he encloses and retains with his own lands.

In apparent contrast with this expression in the 5th section, the 6th section provides for the case when the *original allowance lies between lands owned by different parties*. In that case the municipality was directed to convey a part to each of such parties.

In the Municipal Institutions' Act of 1858, section 318, the Legislature has used different language in some respects; but whether or not so as to convey an intent different from that expressed in the 5th and 6th sections of 20 Vic. ch. 69, I find it difficult to say. The identical language of the 6th section is preserved, but that of the 5th is altered, and the person expressed to be entitled to a conveyance from the municipality of the original allowance for road is the owner of the land appropriated for the new road; provided "his *lands* adjoin the original road allowance," in lieu of which the new road is laid out. The contrast is certainly not so marked as in 20 Vic. ch. 69, but I cannot say that the expression, "provided his lands adjoin," may not mean land on either side of the original allowance; and so that no difference whatever was intended by the Legislature in the description of the condition of the person entitled to claim a conveyance of the old road to be made to him.

But, in the view which I take, it is unnecessary to pursue this consideration further, for I do not think that the case before us absolutely requires us to put a definite construction upon this portion of the section.

However, a question now arises here, namely, had the Act 20 Vic. ch. 69, or the sections in lieu thereof in subsequent statutes, namely, the 318th section of the Act of 1858, or, which is identical therewith, the 332nd section of ch. 54 of the Consolidated Statutes, or the 334th section of the Act of 1866, any retroactive effect, and, if so, to what extent? Could any of those clauses have been intended to apply to a case like this, namely, of a road which, about twenty years before the passing of the first of the above mentioned Acts had been, as the plaintiff here contends, laid out by authority of the Quarter Sessions, and which had ever since been

used and maintained at the public expense, and travelled upon as a common public highway, and which had become vested in the municipal corporation of the township upon the passing of the first Municipal Corporations' Act of 1849, freed and discharged of any claim whatever of the owners of the land upon which the new road had been made? Could it have been intended to confer a right to which there had not, for twenty years or thereabouts namely, from the time of the alleged substitutional road having been first made, existed any semblance or pretence of claim whatever?

I must confess to entertaining great doubts that the section alluded to in the 318th section of the Act of 1858 had any such retroactive effect, notwithstanding the words "or in case a new or travelled public road *has been* laid out and opened," &c.

The section commences with a provision relating to the case of any one in possession of a concession road or side line, who has laid out and opened on his own land a road or street in place thereof, without receiving compensation therefor; and as to him, the provision also is that if his lands adjoin the concession road, side line, or original allowance, he shall be entitled thereto in lieu of the road so laid out, and the council of the municipality, upon the report in writing of the surveyor that the new road is sufficient for the purposes of a public highway, may convey the said original allowance for road in fee simple to such person.

Now, if this portion of the section is not retroactive, but must be construed as applying only to the future, in like manner, as it appears to me, must the residue of the section, which is involved in the one sentence; and that this first portion of the section only relates to the future appears to me conclusively upon reference to the 322nd section of the Act of 1858, which is identical with the 336th section of ch. 54 of the Consolidated Statutes.

These sections declare that "Every public road, street, bridge, or other highway in a city, township, town, or incorporated village, shall be vested in the municipality \*

\* *except* any concession or other road within the city, township," &c., "taken and held possession of by an individual in lieu of a street, road or highway, laid out by him without compensation therefor."

Now these words, "In case any one in possession of a concession road or side line has laid out and opened a road or street in place thereof," if they relate to the past, it would be insensible to enact that the municipality might convey it to such person, when the 322nd section declares that such a road shall not be vested in the municipal corporation.

Applying the words to like cases arising in the future, then the Acts upon the subject are consistent in providing that the municipality may convey.

Then again the provision as to the report in writing of the surveyor as to the sufficiency of the new road, which seems to be made a *sine quâ non* to the existence of the right claimed, appears to me to be a condition precedent to the *acceptance* by the municipality upon behalf of the public of the new road as a public highway, to be a provision applicable to the future and not to the past, and to be altogether inappropriate to the case of a road which, as the plaintiff contends, had twenty years previously been acquired as a public highway by the justices of the peace in Quarter Sessions by due process of law, and which therefore had been vested in the municipality as a public highway by the Act of 1849, so that all necessity for a certificate of a surveyor as to its sufficiency was quite useless.

But assuming for the sake of argument the sections referred to to have a retroactive effect, it becomes still an important question to what cases do they apply.

In my judgment they do not apply at all to the case of a road which had been opened by the Quarter Sessions in exercise of the powers vested in the justices in Quarter Sessions assembled by due process of law before the establishment of municipal corporations, or to any road opened by a municipal corporation in exercise of the powers vested in them to take the lands of private persons against their will for public purposes.

They do not, in my judgment, apply to the case of a person who, having it in his power to prevent his land being taken from him without compensation, surrenders it, for reasons of his own, for the use of the public, voluntarily, without compensation other than such as the opening of the road may give him.

The Quarter Sessions could not have taken any part of the land to make the road reported upon by Ewing in 1837, without securing under the statute compensation to the parties whose land was taken. The road could not have been legally opened by the Court of Quarter Sessions, unless the respective owners of the land taken had given their discharge or acquittal for compensation, or a release to the use of the public of the land taken.

The provision seems to me to apply, not to cases in which, the process of law being put in motion by parties authorized to take against the will of the owner, compensating him, the parties affected, though having the means afforded them by law of compelling compensation to be given, voluntarily surrender their land to the use of the public without any compensation other than such as the work itself may give them, as if they had been compensated; but to cases where any one, for his own convenience as well as for that of the public, lays out upon his own land a new road or part thereof in lieu of the original allowance or some part thereof, subject to this qualification, that the municipality, upon behalf of the public, shall accept the new road or part thereof upon behalf of the public, which, as it seems to me, should be by by-law under the provisions of the 323rd section of the Act of 1858, identical with the 337th section of ch. 54 of the Consolidated Statutes, then in case the original allowance shall be no longer required for any public purpose, and is not required to be kept open for the purpose of supplying to some person ingress and egress to and upon his lands or place of residence over such original allowance, &c.

But whether the road in question is to be regarded as having been laid out by authority of Quarter Sessions in

due process of law, or was voluntarily laid out and opened by the respective owners of the land upon which it was made, and whether the sections referred to have or have not a retroactive effect, I am still of opinion that the present owner in fee of the south half of lot No. 9, who appears to be the plaintiff's wife, and who claims title to the south half of that lot only in virtue of a deed dated the 7th day of October, 1867, and in whose right alone the plaintiff asserts his claim in this action, has no exclusive title whatever to the piece of the original allowance in question between lots 8 and 9, extending along the south halves of lots 8 and 9, nor any claim to have such piece of land conveyed to her.

In *Winter v. Keown*, 22 U. C. R. 341, McLean, C. J., held that the council had no authority to convey the old allowance for road to any one except to the individual through whose land the new road ran at the time it was laid out, and not to him if required for public convenience, or to enable the proprietor of the adjoining land to get to his property.

There the new road was laid out while the fee of the land was in the Crown, and the Chief Justice held that a grantee from the grantee of the patentee, letters patent having issued subsequently to the road having been laid out, could not recover in ejectment, although he had a deed from the municipality.

The present Chief Justice of this Court, who was then a Judge of the Queen's Bench, expressed no opinion upon this point. He said that he wished, as he rested his judgment upon another point, to guard himself from being understood as necessarily holding that the fact of the fee simple being in the Crown until after the new road had actually been opened and used, would prevent an occupant or locatee of the Crown, who afterwards obtained his patent, from claiming the benefit of the statute.

A locatee of Crown Lands, under the provisions of 16 Vic. ch. 159, has certainly, as it appears to me, such an interest, that,—assuming all the other conditions to concur

to call into action the 318th section of the Act of 1858,—he could, under that section, fill the character of “owner,” so as to be entitled under that section to whatever an “owner” of land appropriated for a new road in lieu of an original allowance would be entitled. But it does, I confess, seem to me to be a very different thing to hold that the right which the person who was owner of the land appropriated for the new road at the time the new road was made may have had, should pass through divers mesne conveyances to all grantees of the lot through which the new road was made, describing it by its number and concession, and township, without more, to a person who at any distance of time might become owner of the lot after the road was established upon it, and had become vested in the municipality, so as to enable such last mentioned person to assert as of right a claim which the owner when the new road was made while he owned the land never did assert, and, it may be, always contemplated abandoning—to hold, in effect, that the right conferred by the section upon the owner of the land appropriated for the new road at the time of its being made shall, after such new road shall have become vested in the municipality, pass by a conveyance of the residue of the lot, as running therewith to a grantee, and so from grantee to grantee, although no expression of any such intention is contained in any of the mesne conveyances, and although the original owner may have been quite content to abandon any right he may have had.

Much might, I think, be said against such a right so passing; but it is not necessary in this case, in my judgment, to decide this point either, because I do not think that, in the case before us, the conditions ever concurred which gave to any one a right to assert the claim now asserted by the plaintiff.

In the first place the road surveyed by Ewing, and approved by the Quarter Sessions in July, 1837, was designed to be made, and the map produced, as I understand it, shews it to have been made in fact as designed, partly

upon lot No. 10, and partly upon lot No. 9, from the front of the 5th concession to the point of divergence indicated in Ewing's report as a point opposite Benjamin Purdy's house. It was designed to be a road of fifty feet in width, and it was in fact laid out of the width of forty feet only, as appears by Russ's, the surveyor's, certificate, dated 31st May, 1873. And I gather from the evidence that the original allowance between lots 8 and 9 was at least sixty feet in width, that is the width which the plaintiff in his second count claims as having been the width of the original allowance for road.

Now, in 1837 the Justices in Quarter Sessions had two powers with respect to roads, namely, to alter a road already established, and to make wholly new roads. They could only exercise the power of altering a road already established, subject to the condition that the new road made in substitution for the altered old one should not be of less width than the old one proposed to be altered. A new road, not made in substitution for an old one, they might make of any width not more than sixty feet, nor less than forty feet.

When, therefore, we find the surveyor Ewing reporting a road of fifty feet in width, which was approved by the Quarter Sessions, and was afterwards laid out of the width of forty feet only, whereas the original allowance between lots 8 and 9 had been always designed as of not less than sixty feet, and when moreover we find the surveyor in his report speaking of the projected road as a new line of road which had been petitioned for, we must, upon principle and upon the authority of *Purdy v. Farley*, 10 U. C. R. 541, conclude that the intention was, to lay out a wholly new road, and not one in substitution for or in lieu of the original allowance between lots 8 and 9, and consequently that no right ever accrued to any one under the 318th section of the Act of 1858, to claim a conveyance of the road allowance between the south halves of lots 8 and 9 or of any part thereof.

But further, had the road reported by Ewing stopped

at the point indicated in his report as "opposite Benjamin Purdy's house," it is plain that such a piece of road could in no sense be designated as in substitution for or in lieu of a road between lots 8 and 9, which was a road designed to extend between these lots from the front to the rear of the concession; but the design was not to stop there. It is apparent also that the design was not to continue it to the end of the concession between lots 9 and 10 parallel with the original allowance for road between lots 8 and 9, in which case, in a partial sense, such a road might be said to be in lieu of the original allowance between 8 and 9, although it never could serve all the purposes of such road. The design was, upon reaching the point opposite to Purdy's house, to cross the lots in a northern and easterly direction. By pursuing this course, the new line reached the road between lots 8 and 9. Now if the design had been that the road should stop here, that might also in a partial sense be said to be in lieu of so much of the original allowance between lots 8 and 9 as lay to the south of the point of intersection of the new road with it; but it did not stop here; it proceeded on an easterly course across lot No. 8, and across the greater part apparently of lot No. 7, until it reached, what appears to me, clearly to have been the essential design of the new road, namely, the Percy road. The reaching of this terminus was, as appears to me, the manifest design, so that, as it appears to me, it is apparent from all these circumstances that, as a matter of fact, the new road, every part of which was necessary to complete the purpose contemplated, was designed, intended, and laid out as a wholly new road, and not at all "*in place*" of that part of the road allowance which lay between the south halves of lots 8 and 9; and that therefore the case never came within the 318th section of the Act of 1858.

But further, the Crown, by letters patent, dated the 12th day of October, 1857, granted to the defendant in fee lot No. 8 in the 5th concession of Haldimand. Now up to that time there was no power whatever which from the time of the passing of 4 Geo. IV. ch. 10, could divest the road

allowance between these lots 8 and 9 from their original purpose. The defendant received his grant, together with all the benefit, privilege, and advantage of this side line. Can then a clause in the Act of 1858 be construed to deprive him of that benefit without any compensation? But this view supports an argument I have already dealt with, namely, that the 318th section of the Act of 1858 cannot be construed to have a retroactive effect.

We find by the evidence also that in April, 1865, the defendant and others petitioned the municipal council of the township to open by by-law the road between the south halves of these lots. Evidence was offered that the person who was the owner of the south half of lot No. 9, when the new road was laid out upon it, and was still owner when the petition was presented, signed that petition. The learned Judge who tried this case without a jury refused to receive this evidence.

In my opinion the evidence was unobjectionable, as tending to shew that the person who originally could, if any one could, have asserted the claim now asserted by the present plaintiff, so far from treating the new road as in substitution for the old, petitioned to have the old road opened. The petition, however, was put in, and has been laid before us, and has the signature to it of the person who was said to have been then and at the time the new road was made the owner of the south half of lot No. 9.

We find by the evidence that the municipal council, in the month of March, 1866, before the conveyance to the plaintiff's wife, passed a by-law for opening this side line between the south halves of lots 8 and 9, reciting therein that it is *necessary* and *expedient* so to do. This by-law was, as it appears to me, an undoubted expression of the opinion of the municipality that the south half at least of this side line was not useless to the public.

The evidence shews that upon the passing of this by-law the road was opened in virtue thereof, and that the defendant and the then owner of the south half of lot No. 9 moved their fences, which before had crossed the side line,

sometimes to lot No. 8 and sometimes to lot No. 9, and placed them along their respective sides of the road allowance. By this means the road was in fact opened, and remained so ever since, unless a by-law passed on the 27th November, 1875, purporting to repeal the by-law of 1866, has the effect of stopping up the road. This by-law of November 1875, is in my judgment quite inoperative; the road having been opened by the by-law of 1866, must remain open until closed by a by-law passed for the express purpose.

If such a by-law should be introduced, it will be time enough to consider whether the municipality has any power to close the road without not only compensating the defendant and those claiming under deeds executed by him, but also providing to the several proprietors of land on lot No. 8 in the terms of the 422nd section of 36 Vic. ch. 48, some other convenient road or way of access to their respective lands.

That the keeping of the side line open is a matter of great importance, even to the defendant himself, independently of his grantees, is abundantly apparent from the evidence.

In my judgment, for the reasons given, the verdict in this case must be rendered for the defendant.

HAGARTY, C. J.—My brother Gwynne has very fully reviewed the statute law affecting the question at issue. I fully concur in the result at which he has arrived.

I cannot understand how the road, proved to have been laid out, can be considered as in lieu of the original allowance, which then ran between the two lots. The direction, course, and connections lead me to regard it as not coming within the meaning of the law on the subject of a new line through private property laid out in lieu of the allowance.

I think we must assume at this date that when the new road was laid out through lot 9, the owner either voluntarily gave the necessary land, or was in fact compensated therefor.

But in any event it is not easy to understand how the plaintiff can assert title in himself, or in any one through whom he claims, without proof of a conveyance to them or to him.

He cannot, in my judgment, claim it simply on the words of the statute, even assuming him to be entitled to have it conveyed to him.

The old allowance for road still remains a road, until some competent authority interpose to deprive it of that character.

I cannot see how it has ever become the plaintiff's property.

GALT, J., concurred.

*Rule absolute.*

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## LEWIS ET AL. V. TUDHOPE ET AL.

*Insolvent Act of 1875—Deed of composition and discharge.*

By a deed of composition and discharge made between the insolvents of the first part, and the several persons, firms and corporations who were creditors of the insolvents, thereafter called the creditors, of the second part,—after reciting the insolvents' inability to pay their liabilities in full, and their agreement with their creditors for a composition and discharge upon the terms and in manner thereafter mentioned, under the provisions of the Insolvent Act of 1875, and the insolvents' agreement to secure the payment of the creditors thereafter mentioned by their notes,—it was witnessed that in consideration of their indebtedness, and of the discharge thereby given, the insolvents covenanted and agreed with all their creditors, collectively and severally, to pay to them and to each of them the amount of the composition specified and agreed upon by several instalments; and for securing the payment of the last three instalments the insolvents covenanted to have conveyed to the assignee the composition notes given to one G. T. G. T., who was not a creditor but a surety to the plaintiffs for defendants' debt, without paying their claim, and without their consent, proved as a creditor and signed the composition deed, and without him there would not have been a sufficient statutory majority.

*Held*, on demurrer to the pleadings set out below:

1. That under secs. 10 and 61 of the Act of 1875, a non-assenting creditor need not have proved his claim to entitle him to the benefits of the deed; 2. That the deed was absolute, and not conditional on a delivery of the composition notes being made, the creditors' remedy being on the insolvents' covenant; 3. That the deed was not open to objection as providing only for the partnership debts, for that it applied both to the joint and separate creditors; 4. That under sec. 2, sub-sec. *h*, and secs. 49–52 of the Act of 1875, the consent to the deed of a majority of those creditors who have proved claims of \$100 and upwards, and representing three-fourths in value of such claims proved, is required; 5. That G. T. had no right to prove.

ACTION for goods sold and delivered, and upon the common money counts.

Plea: That the plaintiffs claim for a debt due to them jointly as partners in business, and for which they are creditors within the meaning of the insolvent Act of 1875, and which is affected by the said Act, and by the discharge under its provisions hereinafter mentioned. And the defendants allege that after the accruing of the cause of action in the declaration mentioned, the defendants, being traders within the meaning of the said Act, became insolvent, within the meaning of its provisions, and after the passing of the Act, and before the commencement of this

suit, a writ of attachment was duly issued out of the proper Court against the estate and effects of the defendants, under which the said defendants' estate and effects were attached. The plea further alleged that the plaintiffs' said claim was for such debt as aforesaid, and was duly mentioned and set forth in the statement of the insolvents' affairs according to the provisions of the said Act, and such proceedings were thereupon had and taken, and such meetings of creditors held, that in pursuance of and in accordance with the provisions of the said Act, a deed of composition and discharge was duly entered into and executed by a majority in number of the said defendants' creditors, who had respectively proved claims against the estate of the defendants to the amount of \$100 and upwards, which had been proved, and such discharge was duly confirmed after notice to the plaintiffs and other creditors of the said defendants, and otherwise, according to the provisions of the said Act, by the proper Judge in that behalf; and the defendants, by virtue of the said deed of composition and the confirmation thereof, and the said insolvent Act, became discharged from the said alleged cause of action.

To this plea the plaintiffs replied setting out the deed of composition referred to in the plea, as follows:—

Second replication: that the deed of composition and discharge in the said plea mentioned was in the words and figures following:—

“This indenture, made the 15th day of December, 1875, between W. R. Tudhope and J. Tudhope, of the town of Orillia, in the county of Simcoe, merchants, trading under the name, firm and style of W. R. & J. Tudhope, hereinafter called the insolvents, of the first part, and the several persons, firms, and corporations, who are creditors of the insolvents, hereinafter called the creditors, of the second part.

“Whereas, the said insolvents are unable to pay their liabilities in full, and their creditors have agreed with them for a composition and discharge upon the terms and in manner hereinafter mentioned, and under the provisions of the Insolvent Act of 1875. And whereas the said insol-

vents have agreed to secure the payments of the creditors hereinafter mentioned by their own joint promissory notes.

"Now therefore this indenture witnesseth, that, in consideration of their indebtedness and of the discharge hereby given, the said insolvents covenant and agree with all their creditors, collectively and severally, that they will pay to them and each of them, respectively, a composition of  $33\frac{1}{3}$  cents in the \$, to be paid by several equal payments, at 6, 9, 12, 15, 18, 21 and 24 months, respectively, from the 23rd of November, 1875; and for securing the last three of such payments to all creditors, except George Tudhope, the said insolvents will obtain an assignment to the said assignee of the composition notes given under this deed to the said George Tudhope, and to be payable according to the times of the said respective composition payments. And the said insolvents further covenant and agree to pay forthwith, upon composition hereof, all costs, charges and expenses connected with the proceedings in insolvency respecting their estate, and inclusive of the costs of this deed of composition and of confirming the composition and discharge hereby effected, including the costs of the solicitors for the assignee, as between solicitor and client, in connection with the proceedings, and the assignee's remuneration.

"And in consideration of the said composition payments so to be made, and of the said security so to be given, the said creditors do, and each of them doth, release and discharge unto the said insolvents all their respective claims against them; and the said creditors do hereby direct and authorize the assignee of the estate of the said insolvents to deliver up and convey to the said insolvents all their estate and effects, upon this deed of composition and discharge being executed by a majority in number of the creditors of the said insolvents, who have proved claims to the amount of \$100 and upwards, and who represent at least three-fourths in value of all the claims of \$100 and upwards, which have been proved.

"And it is declared and agreed that this deed of composition and discharge is made in pursuance of the Insolvent Act of 1875, and may be confirmed thereunder.

"And also that the same shall be ineffectual, unless and until the same shall be executed by the aforesaid proportions in number and value of the said creditors of the said insolvents.

"In witness, &c."

And the replication proceeded:—And the plaintiffs further say that they never signed, executed, or became parties to the said deed of composition and discharge: that the defendants never have, although requested so to do, nor has their assignee, nor any one on his or their behalf, given or offered to them, the plaintiffs, nor to any one for them, nor have the plaintiffs ever received the promissory notes of the defendants for the amount of the composition payments in the said deed mentioned, and by the said deed agreed to be given and made the consideration of the said discharge, nor have such notes ever been made by the defendants, and placed in the hands of the assignee, nor have the said defendants, or any one of them, or on their behalf, paid or tendered to the plaintiffs any part of the said debt, or of the said several amounts of the said composition notes, either when the same fell due or at any other time, and no part of the said deed of composition and discharge has, so far as respects the plaintiffs, been in any manner complied with.

To this replication the defendants rejoined, that the plaintiffs did not prove their claim as required by the said Insolvent Act.

To this rejoinder the plaintiffs demurred, on the ground that it is no answer whatever to the replication.

The defendants also took the following exceptions, amongst others, to the replication to which this rejoinder was pleaded: that the non-delivery of the notes did not entitle the plaintiffs to sue for the original cause of action, but only to enforce under the Insolvent Act the delivery of the said composition notes, on the plaintiffs proving their claim under the Insolvent Act: that the deed is an absolute discharge, and not conditional on the delivery of the said promissory notes: that for all that appears in the replication the plaintiffs are not entitled to rank on the defendants' estate, or to get promissory notes as creditors under the terms of the said deed, and it is not alleged, nor does it appear, that they proved their claim against the defendants or their estate.

Third replication: that the said deed was not signed and executed by a majority of the creditors of the said defendants, who were respectively creditors for the sum of \$100 and upwards, and who represented at least three-fourths in value of the liabilities of the said defendants.

To this replication the defendants demurred, upon the ground that, as the defendants contend, all that is necessary is, that, as is averred in the plea, the deed should be executed by a majority in number of the creditors who had proved, representing three-fourths in value of the debts proved.

Fourth replication: that the said discharge was obtained by fraud and misrepresentation in this, that one George Tudhope executed the said deed, and pretended to be a creditor of the said defendants, when in truth and in fact the said George Tudhope was not a creditor of the said defendants, but was security to the plaintiffs for the debt due to the plaintiffs from the defendants, and the said George Tudhope has not at any time paid the said debt; and that he, the said George Tudhope, could not, without payment of the said debt, and without the consent of the plaintiffs, prove against the estate, or execute a deed binding as a release upon the plaintiffs, and the plaintiffs have never given such consent; and that without and besides the said debt due the plaintiffs, and fraudulently represented by the said George Tudhope, the said deed was not executed by a majority in number of those creditors of the said defendants who had proved their claims for the sum of \$100 and upwards, and who represented at least three-fourths in value of the liabilities of the said defendants which had been proved.

To this replication the defendants rejoined that the said George Tudhope, believing in good faith that he had a claim against the defendants as their creditor upon a contract dependent upon a condition or contingency, duly, and in good faith, and without any fraud or misrepresentation, proved his claim against the estate of the defendants, and the claim of the said George Tudhope was not objected to at any time, nor was the amount thereof, either by the

plaintiffs, who had notice thereof, nor by the assignee, nor by any of the creditors of the defendants, nor by the defendants; and the said George Tudhope thereby became entitled to rank upon the defendants' estate, and to be computed among the number of the defendants' creditors, and the amount of his claim to be taken into account as a portion of their liabilities.

To this rejoinder the plaintiffs demurred, upon the ground, that it is no answer to the replication to which it is pleaded.

The defendants also excepted to the replication upon the ground, that it appears upon the replication that George Tudhope had a legal claim against the defendants' estate, for which, as a creditor, he had a right to prove, and that the facts alleged in the replication do not, as is contended, amount to fraud or misrepresentation, so as to avoid the deed; and that George Tudhope's claim, not being contested in the Insolvent Court, could not be disregarded, and had to be recognized by the assignee; and upon a further ground, which however was removed by an amendment agreed to at the argument, so as to make the replication read at the close: that without the claim, so as in the replication alleged to have been represented by George Tudhope, the deed was not executed by a majority in number of the creditors of the defendants, *who had proved their claims* for the sum of \$100 and upwards, and who represented at least three-fourths in value of the liabilities of the said defendants, *which had been proved*. The words in italics being added.

On January 23rd, 1877, the demurrers came on for argument before Morrison, J., and were directed, with the consent of the parties, to be argued before the full Court.

In this term, February 10th, 1877, they were accordingly argued.

*McMichael*, Q. C., for the plaintiffs. The deed is void, as it only applies to the partnership and not to the separate

creditors : *Tomlin v. Dutton*, L. R. 3 Q. B. 466 ; *Re Garret*, 28 U. C. R. 266 ; *Pidgeon v. Martin*, 25 C. P. 233 ; *Bond v. Weston*, L. R. 1 Q. B. 169. The plea is therefore bad. The first replication is good. The delivery or tender of the composition notes is a condition precedent to the composition and discharge taking effect, and the plaintiffs are not restricted to the insolvents' covenant. The rejoinder to this replication is bad, as it is not necessary that the plaintiffs' should have proved their claim : Insolvent Act, 1875, sec. 59. Also, a majority of creditors must sign, namely, of all the creditors, and not merely those who have proved ; but even if, as appears in the fourth replication, a majority of those who prove be sufficient, there was no such majority here. The surety, until he had paid the debt, had no right to prove and to assent to the deed. The rejoinder to this replication is clearly no answer : Insolvent Act, 1875, secs. 49-52.

*McCarthy*, Q. C., contra. The point as to the separate creditors is not open here, for it does not appear that there were any separate creditors ; and if there were none, the deed is clearly good : *Rickson v. Emary*, L. R. 3 C. P. 546. The whole deed must be looked at, and it clearly shews that it includes separate creditors. The inclination of the courts is to uphold these deeds, and in all the cases in which they have been held bad, they have gone out of their way to provide for a particular class of creditors : *Bamford v. Clewes*, L. R. 3 Q. B. 729 ; *Re Glenn*, L. R. 2 Ch. 670 ; *McLaren v. Baxter*, L. R. 2 C. P. 559 ; *Gresty v. Gibson*, L. R. 1 Ex. 112 ; *Isaacs v. Green*, L. R. 2 Ex. 352 ; *Tetley v. Wanless*, L. R. 2 Ex. 21 ; *Johnson v. Barratt*, L. R. 1 Ex. 65. The plea is therefore good. The second replication is no answer. It was not necessary that the insolvents should have delivered or tendered the notes, but the plaintiffs have their remedy on defendants' covenant. It is also necessary that the plaintiffs should have proved. The rejoinder is therefore good. The third replication is also bad. The majority required to assent to the deed are only of those who have proved. There was a proper

majority here, as the surety had the right to prove; but even without him there was a sufficient majority. The fourth replication is therefore bad, and the rejoinder to it good.

March 9th, 1877. GWYNNE, J., delivered the judgment of the Court.

Upon the demurrer to the rejoinder to the replication setting forth the deed of composition *verbatim*, judgment must be for the plaintiffs, for there is nothing in the Act which makes the right of a non-assenting creditor to a deed of composition to the benefit provided for him by the deed conditional upon his proving his debt, nor is there reason why it should be so.

The 17th section of the Act requires the insolvent, within ten days from the service of the writ of attachment, or, if the same be contested, within ten days from the date of the judgment rejecting the petition to have it quashed, to furnish the assignee with a correct statement of all his liabilities, direct or indirect, contingent or otherwise, indicating the nature and amount thereof, together with the names, additions, and residences of his creditors, and the securities held by them, in so far as may be known to him. Then the deed of composition, to be good, must provide an equal provision for all the creditors of the insolvent.

Then by the 61st section the deed of composition and discharge, when confirmed, operates as an absolute discharge of the insolvent from all liabilities existing against him, and *provable* (not *proved*) against his estate, secured or unsecured, which are mentioned in the statement of his affairs exhibited at the first meeting of the creditors, or which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge, and in time to admit of the creditors therein named obtaining the same dividend as other creditors. A creditor not named in such list is not affected by the discharge, as was decided in *King v. Smith*, 19 C. P. 319, and *Shaw v. Massie*, 21 C. P. 266.

Here, for the purpose of making the deed of composition and discharge relied upon in the plea binding upon the plaintiffs, the plea alleges that the claim for which the plaintiffs are now suing was duly mentioned and set forth in the statement of the insolvents' affairs furnished by them according to the provisions of the Act, and that thereupon such proceedings were taken that the deed of composition and discharge was executed as stated in the plea.

The plaintiffs' claim was, therefore, as the defendants are obliged to allege in order to bar the present action, one which was provided for by the deed of composition which is relied upon. It cannot therefore be necessary for the plaintiffs to prove it in the insolvency, the object of the deed of composition and discharge being to take the proceedings out of the Insolvent Court by providing an equal composition for all creditors, which, as the defendants' contention is, has been assented to by the requisite statutory majority, so as to bind the non-assenting.

The second section of the Act of 1875, sub-sec. *h*, makes proof necessary to entitle a creditor to vote at proceedings taken in the insolvency; but there can be no necessity for proof of a claim already admitted by the insolvents and returned in their schedule, and which is one of the claims provided for by the deed of composition.

Upon the argument to the exceptions to the replication, it was contended upon the part of the plaintiffs that, as the deed which was set out in the replication shewed upon the face of it that the release and discharge contained in the deed was expressed to be executed in consideration of the composition payments so to be made, and of the said security so to be given, and as the replication averred that those notes had not been given or tendered to the plaintiffs, and that the instalments of composition accrued payable had not been paid or tendered, the plaintiffs' original claim still remained unaffected by the deed. To this it was answered that the plaintiffs had their remedy for the composition agreed upon under the covenant of the defendants in the deed.

It was also insisted upon the part of the plaintiffs that they were not barred of their original claim, because the deed upon its face shewed that only the joint creditors of the partnership, of which the defendants were members, were those provided for by the deed, and that no provision was made thereby for their respective separate creditors. To this it was answered that it sufficiently appeared by the deed that all creditors of the insolvents were provided for, and that this was sufficient to enable their respective separate creditors to take advantage of the deed.

The decisions as to the validity of these composition deeds are no doubt very conflicting, and very embarrassing by reason of their conflict. But I think the rule now is to support them, if they are so framed as to shew an intention to provide for all creditors, and to shew an intention to comply with the provisions of the statute in that behalf, and that upon a reasonable construction of the terms of the deed no creditor is *excluded* from the benefits provided by the deed.

As respects the first of the points above taken, the true construction to be put upon the deed, as it appears to me, is, not that the release and discharge are to come into operation only upon the payment of the composition, or upon the giving of the promissory notes of the insolvents for the composition agreed upon, but that the release and discharge are to operate from the execution of the deed; and as there is nothing in the deed declaring that the discharge shall become inoperative upon non-payment of any of the composition instalments, or upon non-delivery of the notes at any time specified, the release and discharge must be held to be absolute and unconditional, and to operate from the execution of the deed by the statutory majority of the creditors.

It is to be observed, firstly, that to make the release and discharge operative no consideration was necessary to be stated, and to hold the statement of the consideration, in the terms in which it is expressed, to be a statement of a condition precedent, to be fulfilled before the release should

come into operation, would be a straining of the expressions in the deed at variance, as it appears to me, with the plain intention of the deed.

The deed recites that the insolvents, being unable to pay their debts in full, had agreed with their creditors for a composition and discharge, upon the terms and in the manner thereafter mentioned, and that the insolvents had agreed to secure the payment of the composition by their own joint promissory notes.

The deed then, indicating the terms and manner of payment, has inserted in it a covenant of the insolvents, expressed to be entered into in consideration of their indebtedness, and of the discharge by the deed given, by which covenant the insolvents promise and agree with all their creditors collectively and severally to pay them, and each of them respectively, the composition of  $33\frac{1}{2}$  cents in the dollar, at 6, 9, 12, 15, 18, 21, and 24 months respectively from the 23rd day of November, 1875, and that they will give to each of their creditors their promissory notes for such composition payments secured by such notes, to bear date the 23rd day of November 1875. The security for the giving the notes is this covenant. When then the deed says that in consideration of the composition payments so to be made, and of the said security so to be given, the creditors *do* and each of them *doth* release and discharge, &c., the reasonable construction, I think is, that these words, *so*, &c., as here used, must be held as referring to the covenant by which the composition is agreed to be paid, and the notes are agreed to be given, which covenant thus in substance is the consideration for the release. However, we cannot, I think, from this mode of expressing the consideration upon which the release and discharge are executed, construe the release, which is in terms absolute, to be conditional, and declare that it shall only come into operation at a future time upon an event happening, when it in express terms declares in the present tense that it operates upon and from the execution of the deed. The covenant of the insolvents contained in

the deed, and the release by the creditors therein also contained, are, as it appears to me, the one the consideration for the other, and the release must be held to operate from the time of the execution of the deed by the statutory majority of creditors.

In *Dewhirst v. Jones*, 3 H. & C. 60, the release was expressed in the deed of composition to be made in consideration of the covenant of a surety, and of the joint and several promissory notes of the debtors and the surety for the payment of the composition, and it was held to be valid and binding upon non-assenting creditors, although no notes had been delivered to them, for that they could sue upon the covenant, which was a covenant to pay the composition hereinbefore mentioned, and that this included the making and delivery of the notes, as well as the subsequent payment.

In the case before us the covenant is, that they will give the notes.

In *Lay v. Mottram*, 19 C. B. N. S. 479, where the deed simply recited an agreement of the debtors to pay a composition in two instalments, and that the creditors signing to the required number had consented to accept such composition, and the deed witnessed that, in consideration of the premises, the creditors released the debtors, it was held that the recital of the agreement operated as a covenant to pay the composition, and that the release was absolute, barring an action upon the original debt brought by a non-assenting creditor.

In *Tetley v. Wanless*, L. R. 2 Ex. 21, the release was expressed to be in consideration of the joint and several promissory notes of the debtors and a surety, and it was held to be valid and to bar an action at the suit of a non-assenting creditor upon his original debt, although the promissory notes had not been tendered, the release itself being fettered by no condition as to the tender or delivery of cash or notes to the creditors.

In *Clapham v. Atkinson*, 4 B. & S. 722, the deed contained only a covenant by the creditors that upon payment

of the agreed composition upon a day named in the deed, and whenever thereafter called upon for the purpose, they would execute to the defendant a release of their claims and demands upon him.

As regards then the point which has been made affecting the character of the release, namely, whether it is absolute or conditional, I am of opinion that it is absolute and unfettered by any condition as to a tender or delivery of the promissory notes or otherwise.

In so far as the other point is concerned, namely, that the deed provides only for the partnership debts of the insolvents, that objection cannot, as it appears to me, prevail. We must look at all the circumstances surrounding the execution of the deed, as well as the expressions used in the deed, to ascertain the intention of the parties, and to put a reasonable construction upon the deed.

In the first place a writ of attachment in insolvency had issued against the insolvents, who were merchants trading in co-partnership under the name, style, and firm of W. R. & J. Tudhope. Upon the proceedings under the writ all claims existing against the insolvents, as well separate as joint debts, were cognizable and provable, and it is expressly declared in the deed that it is made in pursuance of the Insolvent Act of 1875, the provisions of which would require that in a deed of composition and discharge *all* the creditors, both the joint and several, should be equally provided for. It then recites that the insolvents had agreed with their creditors for a composition and discharge under the provisions of the Insolvent Act of 1875, thus plainly and in express terms shewing that the intention of the insolvents was to comply with, and not to defeat, the provisions of that Act. The deed then is expressed to be made between the insolvents of the one part, and the several persons, firms, and corporations, who are creditors of the insolvents, thereafter called the creditors, of the other part. This deed then being expressed to be made under the provisions of the Insolvent Act of 1875, we may look to the Act to see who are comprehended under this

term, and applying the principle of the Interpretation Act that the singular number includes more persons, parties, and things of the same kind than one, to sec. 2 sub-sec. h. of the Insolvent Act, we find the word creditors to mean *every* person, copartnership, or company to whom the insolvents are liable, whether primarily or secondarily, and whether as principals or sureties; but in reference to proceedings at meetings in insolvency, to the right of voting, to the execution of a deed of composition and discharge, the consent to the discharge of an insolvent, or any other consent or action with regard to the management and disposal of the estate of an insolvent, the word creditors shall mean persons, copartnerships, or companies, whose unsecured claims to an amount of \$100 and upwards have been proved in the manner provided by the Act.

Then the deed contains a covenant by the insolvents, whereby they covenant and agree, not with the creditors of the partnership firm only, as was the case in *Tomlin v. Dutton*, L. R. 3 Q. B. 466, but with *all their creditors collectively and severally*, that they will pay to them and each of them respectively a composition of  $33\frac{1}{3}$  cents on the dollar of their respective claims against the insolvents.

In *Re Garratt*, 28 U. C. R. 266, the same point was raised as in *Tomlin v. Dutton*, but there the deed was professed to be made with the several persons subscribing being also creditors of the said Garratt & Co., a term apparently equivalent with that of the "partnership firm" in *Tomlin v. Dutton*, and moreover the judgment of the Court is put upon another defect in the deed, namely, that it was not executed by the insolvents.

The deed further witnesseth that the said creditors, in consideration, &c., &c., do and each of them doth release and discharge unto the said insolvents all their respective claims against them, and the said creditors do hereby direct and authorize the assignee of the estate of the said insolvents to deliver up and convey to the said insolvents all their estate and effects, upon this deed of composition and discharge being executed by a majority in number of

the creditors of the said insolvents who have proved claims to the amount of \$100 and upwards, and who represent three-fourths in value of all the claims which have been so proved.

The plain expressed intention of the deed is, to take the estate out of insolvency so soon as the deed shall be executed by the statutory majority of creditors, and as there is nothing in the deed to shew an intention to exclude any creditor who could prove in the insolvency, or to limit the provision contemplated by the deed to the partnership creditors only; and as the expression, "all their creditors collectively and severally," is, in my judgment, sufficient to include the separate creditors, if there are any, of each of the insolvents, I think that, in so far as that objection is concerned, the deed should be upheld as valid upon the authority of *McLaren v. Baxter*, L. R. 2 C. P. 559; *Isaacs v. Green*, L. R. 2 Ex. 352; *Tetley v. Wanless*, L. R. 2 Ex. 21; *Lay v. Mottram*, 19 C. B. N. S. 479; *Dewhirst v. Jones*, 3 H. & C. 60; *Gresty v. Gibson*, L. R. 1 Ex. 112; *Johnson v. Barratt*, L. R. 1 Ex. 65; and *Hodgson v. Wightman*, 1 H. & C. 810.

A separate creditor of either of the insolvents can, as it seems to me, sue upon this covenant. Indeed the deed seems to me to place the separate creditors of each of the insolvents, if there be any, upon a precise equality with the creditors of the partnership in this respect, that they, as well as the joint creditors, have the joint covenant of the insolvents as security for the payment of their composition.

Then as to the demurrer to the third replication, our judgment must be for the defendants upon that demurrer.

Under the provisions of the Acts of 1864 and 1869, no doubt the majority required to consent to a deed of composition and discharge in order to make it binding upon non-assenting creditors, was a majority in number representing three-fourths in value of the amounts due to *all* the creditors of the insolvents. This, by the Bankruptcy Act of 1861, was the law of England also.

With reference to this power, Lord Westbury, in *Ex*

*parte Cockburn*, 9 L. T. N. S. 464, says, at p. 466: "The power given by the Act to a certain majority of creditors to bind, and in fact to release, the debts of the minority, in cases where there is no *cessio bonorum*, is no doubt a great and extraordinary power. It of course rests on the assumption that terms which so large a proportion of the creditors both in number and value are willing to accept from an insolvent, must be advantageous to the whole body of creditors."

The Legislature, however, has by the Act of 1875, in the second section, sub-sec. *h*, and the 49th, 50th, 51st, and 52nd sections of the Act, in the plainest terms substituted a different majority, namely, a majority in number of the creditors who have respectively proved claims of \$100 and upwards, and who represent at least three-fourths in value of all the claims of \$100 and upwards *which have been proved*.

The object the Legislature had in view in making this alteration in the law was, I apprehend, to insure early proof by the creditors of their claims in the proceedings in insolvency; but it may be feared that where, as often happens, many creditors of an insolvent reside in the United Kingdom, those on the spot here may consent to terms not altogether to the advantage of those not here, which, however, under the Act of 1875 would be binding.

Such an abuse of the Act may perhaps be possible. Our duty however is to declare the law, and that in this respect it is, as contended by the learned counsel for the defendants.

Upon the demurrer to the rejoinder to the fourth replication, our judgment, in my opinion, must be, that the replication as amended at the argument is good, and the rejoinder bad.

The state of the case on those pleadings is, that George Tudhope, who was not a creditor at all of the defendants, but who was surety to the plaintiffs for the defendants' debt to them, without any right in law, was permitted to prove for the debt due to the plaintiffs as for a debt due to himself, and his vote upon the deed of composition and

discharge was taken, without which the necessary statutory majority to make the deed binding upon the assenting creditors was not obtained.

Whether conduct of this nature be termed fraud or misrepresentation, or by any other name, a deed of composition and discharge so obtained can have no effect whatever under the statute, and it is no answer to say that the person so professing to prove for the debt due to another, and so acting, believed that he had a right in law to do that for which in law there cannot be any justification.

The proof thus made by George Tudhope represents the amount due to the plaintiffs, which by the deed the insolvents so liberally covenant to apply as security for the payment to their other creditors of the last three instalments of the composition; and to this George Tudhope assents. Conduct such as this certainly seems to carry upon its face the appearance that the deed was contrived with the view of defeating the plaintiffs' claim, and not of placing them *bonâ fide* on an equality with the other creditors of the insolvents, and it opens, as it seems to me, abundant foundation for a replication which would afford a complete answer to the plea, even though it should appear that, without counting George Tudhope and the amount so allowed to proof in his name, a majority of creditors who have proved claims of \$100 and upwards, and representing three-fourths in value of the amount *proved*, have executed the deed of composition; but perhaps the point can be as effectually raised upon the issue in fact joined on the plea.

Our judgment upon these demurrers must, I think, be for the defendants upon the exceptions taken to the first special replication, called in the demurrer book the further replication to the plea, and for the plaintiffs on the demurrer to the rejoinder to that replication; for the defendants upon the demurrer to the third replication; and for the plaintiffs upon the exceptions taken to the fourth replication, and upon the demurrer to the rejoinder thereto.

*Judgment accordingly*

## LEY V. WRIGHT.

*Sale of land for taxes—Description—Assessment.*

On a tax sale certain land assessed for taxes was described in the assessment as the north part of a certain lot containing 30 acres; and the certificate and deed were of the same piece.

*Held*, that this description included the most northerly thirty acres only, and that it and no other part was effected by the assessment.

Of the thirty acres so assessed it appeared that portions thereof were vested in the Crown, in other owners, and occupied as gravel roads.

*Held*, that the assessment was void as to such portions; and being void as to part was void as to the whole; and that the deed made in pursuance thereof was void also.

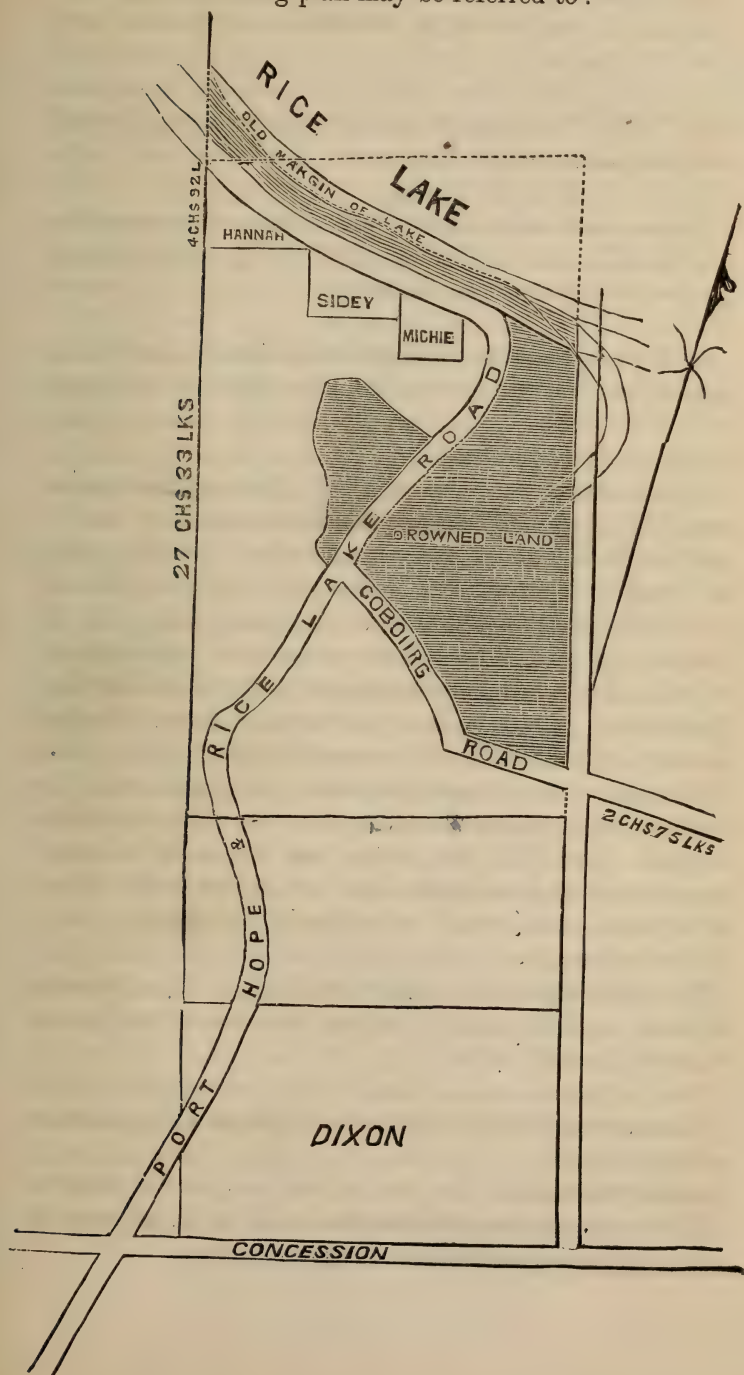
THIS was an action of ejectment to recover possession of part of lot No. 33 in the 8th concession of Hamilton, described as follows: commencing on the south-west corner of a piece of land deeded to Philander Hannah, being on the western limits of said lot, at a distance of four chains and ninety-two links southerly from the southerly limit of the Port Hope gravel road: thence south  $16^{\circ}$  east, along the western limit of said lot, twenty-seven chains, and thirty-three links: thence north  $74^{\circ}$  west, twenty chains, more or less, to the eastern limit of said lot: thence north  $16^{\circ}$  west, two chains and seventy-five links, to the southern limit of the gravel road across the Rice Lake plains to Cobourg: thence along the southern limit of the said road to the edge of the drowned land and the western limit of the Port Hope Gravel road to the southern limits of the aforesaid piece of land deeded to Philander Hannah: thence along the southern limits of said Philander Hannah's land to the place of beginning, containing about twenty-seven acres.

The plaintiff claimed title under a deed from Harriet Boulton, who claimed by mesne conveyances by grant from the Crown.

The defendant claimed title under a deed from J. P. Cummins, who claimed under a tax deed from the warden and the treasurer of the united counties of Northumberland and Durham.

The cause was tried before Patterson, J. A., without a jury, at Cobourg, at the Fall Assizes of 1876.

The following plan may be referred to :—



The paper title was not disputed. The only question was, as to the validity of the tax title, the objection being as to the assessment, which was of the north part of lot 33, containing thirty acres, and which covered, partly land vested in the Crown, partly land occupied by other owners, and partly land occupied by roads. The description in the deed was in effect the same.

The learned Judge was of opinion that the assessment was invalid; and, therefore, also the tax deed; and he entered a verdict for the plaintiff.

In Michaelmas term, November 24th, 1876, *Beaty*, Q. C., obtained a rule *nisi* under the Law Reform Act, to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant.

In the same term, December 7th, 1876, *Hector Cameron*, Q. C., shewed cause. The assessment is bad as covering land belonging to other persons. The description is also defective: *Grant v. Gilmour*, 21 C. P. 18; *Williams v. McColl*, 23 C. P. 189; *Booth v. Girdwood*, 32 U. C. R. 23.

*Beaty*, Q. C., contra. The assessment is sufficient, for even if it is void as regards the lands owned by the other persons, it is good as to the residue; also it is not necessary that the land should be of the most northerly thirty acres, but so long as there is sufficient land in the north part of the lot to cover the assessment it is sufficient. The description is good. Under 32 Vic. ch. 36, secs. 146, 150, it is only necessary to so describe the land that it can be laid off on the ground, and there is no difficulty in doing so here: *Nolan v. Fox*, 15 C. P. 565; *Lyle v. Richards*, L. R. 1 H. L. 222; *Cummings v. McLachlan*, 16 U. C. R. 626; *Doe dem. Notman v. McDonald*, 5 U. C. R. 321; *Doe dem. Murray v. Smith*, 5 U. C. R. 225.

February 5th, 1877. GWYNNE, J., delivered the judgment of the Court.

The verdict which the learned Judge, who tried this case without a jury, rendered in favour of the plaintiff must, in my judgment, be sustained for divers reasons.

No construction, in my judgment, can be put upon the assessment other than that it is upon the north thirty acres of lot 33 in the 8th concession of Hamilton: the most northerly thirty acres of that lot, and no other part was, in my judgment, affected by the assessment.

The land sold for the arrears of taxes was also, in my judgment, no other than the same thirty acres.

The certificate of the sale given by the treasurer is:—"I certify that I have this day sold to Jeremiah Purdon Cummins, thirty acres, north part of lot No. 33," &c.

This defines, in my judgment, the most northerly thirty acres of the lot, and is the same as if it had run, "I have sold," &c., "the north part of lot No. 33," &c., "containing thirty acres.

The deed from the warden and treasurer to Cummins covers also, in my opinion, the same north thirty acres, for although the land and premises are spoken of as being composed of thirty acres off the north part of lot No. 33, in the 8th concession of the township of Hamilton, it proceeds to give a precise description of the thirty acres intended to be conveyed, as follows:—"Commencing on the western limits of the said lot, where it intersects the shore of Rice Lake." A reference to the plans produced in evidence shews that this point of commencement is the north-west angle of the lot. The description proceeds:—"Thence in an easterly direction, along the shore of the lake, to the eastern limit of the said lot." This points, as it appears to me, having regard to the evidence, to the northerly boundary of the lot as originally surveyed and granted by the Crown, and the point on the eastern boundary is no other than the north-eastern angle of the lot, as originally surveyed. The description then proceeds:—"Thence south  $16^{\circ}$  east, far enough to make thirty acres off the north end of the said lot, by a line running westerly, parallel to the concession line in front of the said lot, to the western limit of the said lot."

This last paragraph indicates, I think, very clearly, that the thirty acres was to be taken off the lot at its north end,

making the "*north end*" as a parcel of land containing more than thirty acres, it may be fifty acres or one hundred acres. However, if this description does not cover the most northerly thirty acres of the lot as originally surveyed, it cannot, in my opinion, cover any other piece of land, because it appears by the evidence that the first line drawn "*along the shore of Rice Lake,*" is what was the original northern boundary of the lot, and can lead to no other point on the eastern boundary line than the north-east angle of the lot.

Now, this description covers several acres of land occupied as a gravel road, which has been taken off the lot, and is either the property of some road company or of the municipality for the use of the public. It covers also about an acre, the property of one Hannah, which, in the years for which the thirty acres were sold for alleged arrears of taxes was assessed to Hannah, and the taxes paid by him. It covers also about half an acre, the property of one Sidey, and one quarter of an acre, the property of one Michie, which during the same years were assessed to them respectively, and the taxes so assessed were paid by them; and last, it includes a large portion of the north-easterly end of the lot, which had been surrendered to the Crown by the grantee of the lot in the year 1859. The quantity of the land so surrendered which would be comprised within the description of the most northerly thirty acres, does not clearly appear. It would seem, I think, by reference to the plan produced, to be not less than twelve or fourteen acres, so that, between land vested in the Crown, occupied in roads, and vested in other owners, the description of the land purported to be conveyed to Cummins cannot, I should think, be less than twenty acres.

Now the defendant seeks to exclude from the description all the land vested in the Crown and that occupied by roads, and as, I understand him, also the one and three-quarter acres or thereabouts vested in other persons, and to hold thirty acres still of the residue of the lot. There can be no shadow of foundation, as it appears to me, for such

a contention. A part of the land for which this action is brought is clearly outside of the north thirty acres of the lot, outside of the description in the deed to Cummins, and for so much the plaintiff would be clearly entitled to recover; but I concur with the learned Judge in treating the assessment as void, as covering partly land vested in the Crown, partly the land of other owners, and partly the land occupied by roads, and inasmuch as the description in the deed covers these lands and cannot affect them, and the assessment being void as to a part must be void as to the whole, and so must be the deed made in pursuance of it; and that therefore the plaintiff is entitled to recover the whole of the land described in his writ of ejectment, and to recover which this action is brought.

The defendant's rule will therefore be discharged.

*Rule discharged.*

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FITZGERALD ET AL. V. THE GRAND TRUNK RAILWAY  
COMPANY.

*Agreement—Additional parol term—Railways—Conditions.*

Under a verbal contract between plaintiffs and defendants, the defendants agreed to carry certain petroleum oil of the plaintiffs in covered cars, and on the faith of its being so carried it was delivered to the defendants, but it was carried in open cars, and a large quantity was thus lost. On the delivery of the oil to defendants, the plaintiffs signed a "Request note," which said nothing about covered cars, and under which the goods were stated to be sent subject to certain terms and conditions endorsed thereon.

*Held* that the verbal contract in no way varied or contradicted the writing, and must be incorporated with it, so that the whole contract must be read as for carriage in covered cars.

In this case a nonsuit was entered for the plaintiffs' omission to give notice in writing of their claim within 24 hours of the delivery of the goods to defendants' freight agent at Halifax, in pursuance of a condition to that effect; but as the pleas did not set up that there was such an officer there, and the evidence in the case had not been fully given, a new trial was granted, with liberty to the parties to amend their pleadings.

**DECLARATION.** First count: alleging that defendants contracted to carry certain goods of the plaintiffs from London to Stratford in common, open, and other cars, and from Stratford to Halifax, in the province of Nova Scotia, in covered cars, carriages, or other covered conveyances, and there deliver to one William Hare, according to the plaintiffs' directions; and averring as a breach that, though the defendants carried the goods from London to Stratford, yet that they did not carry the said goods from Stratford to Halifax aforesaid, in covered cars, carriages, or other covered conveyances, whereby, and by reason whereof, the said goods were damaged, lost, and destroyed.

Second count: that the defendants were carriers of goods for hire from London to Stratford and from Stratford to Halifax, and the plaintiffs delivered to the defendants, and the defendants received as such carriers, certain goods of the plaintiffs, to wit, a large quantity of refined petroleum or coal oil (in barrels suitable for the purpose of carrying said oil) to be by the defendants taken care of and safely and securely carried in common, open, or other cars or carriages from London to Stratford, and from Stratford to Halifax in

covered cars, carriages, or other covered conveyances, and there delivered to William Hare for the plaintiffs. And the defendants agreed with the plaintiffs to take care of and safely and securely to carry the said oil in the said barrels, in common, open, or other cars or carriages, from London to Stratford, and in covered cars, carriages, or other covered conveyances from Stratford to Halifax, and there deliver the same for plaintiffs as aforesaid, within a reasonable time in that behalf, for reward to the defendants; and a reasonable time for carrying and delivering the same, as aforesaid, elapsed, yet the defendants did not take care of the said goods and safely and securely carry the same in common, open, or other cars or carriages, from London to Stratford, and in covered cars or carriages, or other covered conveyances, from Stratford to Halifax, and there deliver the same for the plaintiffs as aforesaid, but so negligently carried the same that the said barrels were exposed to the sun and weather, and were broken, damaged, and destroyed, and the said barrels were damaged and lost to the plaintiffs.

Third count: In substance the same as the second count, but varying the statement.

Pleas: To the first count.

1. Non assumpsit.

2. That the plaintiffs did not deliver the said goods and chattels to the defendants, nor did they, the defendants, accept or receive the said goods and chattels from the plaintiffs upon the terms and conditions or in the manner and form in the first count alleged.

3. That the said goods and chattels were delivered to the defendants by the plaintiffs and were accepted and received by the defendants, upon, and subject to the terms and conditions of a special contract, respecting the care, carriage, and delivery of the said goods, made by and between the plaintiffs and defendants in that behalf; and that one of the terms and conditions of the said contract aforesaid is that no claim for loss or damage, for which the defendants are accountable, should be allowed, unless notice in writing is given to the station freight agent of the defendants within

twenty-four hours after the goods are delivered: that defendants did carry the said goods from London to Halifax and there delivered the same to the said William Hare, who accepted and received the same from the defendants, and that no notice in writing was given to the defendants, or to the station freight agent of the defendants, of the said loss or damage within the said twenty-four hours after the said delivery of the said goods, as in this plea above mentioned, which are the causes of action, &c.

4. Setting up another condition, whereby, amongst other things, defendants were not to be liable for any loss or damage from leakage arising from any cause whatsoever, and that oil and molasses would under no circumstances be carried save at the risk of the owners or parties by whom they were consigned: that the goods were petroleum oil, and that defendants did carry the same from London to Halifax, and there deliver the same to the said William Hare, who then and there accepted and received the same from the defendants; and that the causes of action are for leakage, delays, and other matters and things mentioned and provided for in the condition in this plea above contained, and in respect of which it was stipulated that the defendants should not be liable as aforesaid, which are the causes of action &c.

The fifth, sixth, and seventh pleas to the second count, and the eighth, ninth, tenth, and eleventh pleas to the third count, were respectively the same as the first, second, and third and fourth pleas to the first count.

The plaintiffs joined issue on the defendants pleas.

Second replication, on equitable grounds, to the third, fourth, seventh, tenth, and eleventh pleas: that previous to the time when the plaintiffs delivered the said goods in the several counts mentioned to the defendants to be carried by defendants, the defendants entered into special parol agreements with the plaintiffs to carry the said goods on the terms and conditions in the said several counts mentioned, which said special parol agreements were never reduced into writing, and were never intended to be reduced into writing, and are the special agreements in said counts mentioned: that the alleged

special contract mentioned in defendants' third, fourth, seventh, tenth, and eleventh pleas, is a certain receipt prepared by the defendants, given for the said goods by the defendants to plaintiffs, at the request of the defendants, after the delivery thereof by the plaintiffs to the defendants to be carried by them as in the declaration mentioned, and the terms and conditions thereof, mentioned in the said pleas, are certain terms and conditions of carriage endorsed on the said receipts, and not otherwise. And the plaintiffs aver that their attention was not called to, and they did not know, and no notice of the said special conditions, in the said pleas mentioned, so endorsed on the said receipts, and that if they had been notified thereof, or if the same had been brought to their knowledge by the defendants, before or at the time or at delivery of the said goods to the defendants, to be carried as aforesaid, they would not have delivered the said goods to the defendants to be carried by them as aforesaid, as the defendants then well knew; wherefore the plaintiffs say that the defendants ought not in equity to be allowed to say that the said goods were delivered to them by the plaintiffs and that they received the same upon the special contract and the terms and conditions thereof mentioned in the said pleas.

Third replication, also on equitable grounds, to the said third, fourth, seventh, tenth, and eleventh pleas: in substance the same as the preceding replication; but slightly varying the statement.

#### Issue.

The cause was tried before Blake, V. C., at London at the Chancery Spring Sittings of 1876.

From the evidence it appeared that the plaintiffs made a verbal contract with the defendants for the carriage of the oil in common or open cars to Stratford, and from Stratford to Halifax in covered cars; and that in consequence of its being carried in open cars a large quantity of the oil was lost.

At the time the oil was delivered to the defendants, the plaintiffs signed certain shipping or "request notes," dated respectively 3rd May, 1873, and 10th June, 1873, which

said nothing about covered cars, and under which the defendants were requested to receive goods addressed to W. Hare, Halifax, N. S., to be sent, "subject to the terms and conditions, \* \* upon the other side and agreed to by this shipping note, delivered to the company at the time of giving this receipt therefor."

Amongst the conditions so endorsed on the back of the receipt note were:

"It is understood and agreed that the Grand Trunk Railway Company will not be responsible."

"4. For any loss or damage from leakages arising from any cause whatsoever. Oil and molasses will under no circumstances be carried save at the risk of the owners or parties by whom they are consigned."

"11. No claim for loss or damage for which this company is accountable will be allowed, unless notice in writing is given to the station freight agent within twenty-four hours after goods are delivered."

The learned Vice Chancellor was of opinion that the plaintiffs had not complied with the eleventh condition, and he entered a nonsuit.

In Trinity term, September 5th, 1876, *Glass, Q. C.*, obtained a rule *nisi*, under the Law Reform Act, to set aside the nonsuit and to enter a verdict for the plaintiff.

In this term, February 10th, 1877, *McMichael, Q. C.*, shewed cause. The written contract alone must govern, and it says nothing about covered cars. The verbal contract cannot be considered, as its effect would be to vary the written contract. Assuming, however, that the oral contract may be incorporated with the written one, then the contract is governed by the conditions endorsed on the receipt. And by the fourth condition the company were not to be liable for leakage at all, and the oil was to be carried at the owner's risk; but even if the company are liable for leakage, then, under the eleventh condition, notice should have been given to the station freight agent at Halifax within twenty-four hours of the loss. There therefore cannot be

any recovery: *Simons v. Great Western R. W. Co.*, 18 C. B. 805; *Carr v. Lancashire and Yorkshire R. W. Co.*, 7 Ex. 707; *D'Arc v. London and North Western R. W. Co.*, L. R. 9 C. P. 325.

*Glass, Q. C.*, contra. The evidence shews a binding contract on the defendants' part to carry the oil in covered cars; and although there was a subsequent written contract, the verbal contract in no way varied or contradicted it, but merely supplemented it, and therefore it may be incorporated with it: *Malpas v. London and South Western R. W. Co.*, L. R. 1 C. P. 336. The fourth condition must therefore be read as stating that the company will not be liable for leakages, when the oil is carried in covered cars; and also as to the oil being carried at the owner's risk, this means when it is carried in covered cars. Assuming that the defendants are liable for the leakage the eleventh condition does not apply, as there was no station freight agent at Halifax to whom the plaintiff could give the notice: *Smith v. Grand Trunk R. W. Co.*, 35 U. C. R. 574; *Gordon v. Great Western R. W. Co.*, 34 U. C. R. 224, 25 C. P. 488; *Devlin v. Grand Trunk R. W. Co.*, 30 U. C. R. 537.

March 9th, 1877.—GWYNNE, J., delivered the judgment of the Court.

We are of opinion that the evidence shews a binding contract on defendants' part, to carry the plaintiffs' oil in covered cars. We also think it clear that the injury to the plaintiff by reason of the loss of the oil, which was lost, was occasioned by the defendants not so carrying it.

The plaintiffs, it is true, signed a shipping note containing nothing about covered cars, but it is very clearly proved that the defendants' agents most expressly contracted so to carry it, and it was upon the faith that it would be so carried, that the oil was shipped and placed in charge of the defendants.

We think we have the right to hold this parol agreement binding. It does not vary or contradict the written contract.

The law has been settled by many cases. In this Court by *McAdie v. Sills*, 24 C. P. 606, and other cases. In the Queen's Bench by *McGinnis v. Kennedy*, 29 U. C. R. 93.

*Malpas v. London South Western R. W. Co.*, L. R. 1 C. P. 335, is often cited. There upon the face of the shipping note certain cattle were to be carried to Nine Elms Station. Verbal evidence was allowed to prove that they were to be sent on from Nine Elms to King's Cross station.

Erle, C. J., says: "It seems clear on the evidence that there may have been a contract to carry to Nine Elms, and an additional contract to carry on from thence to King's Cross. The parol evidence, therefore, does not vary or contradict the written contract, but only makes an addition to it."

We are of opinion, therefore, that part of the whole contract with the plaintiffs was, that the oil was to be carried in covered cars.

The shipping bill requests the defendants to receive the oil addressed to W. Hare, Halifax, N. S., to be sent by the Grand Trunk Railway of Canada, subject to the terms set out, &c.; but we think that into this notice must be imported, after the words "to be sent," the addition, "*in covered cars only.*"

As the whole evidence has not been entered into, in which case we might perhaps have thought it proper, under the powers contained in the Administration of Justice Acts, as the case was tried without a jury, to amend the pleadings to meet the evidence, the only order which we think it proper that we should make under the circumstances is one under the 50th section of the Administration of Justice Act of 1873, setting aside the nonsuit, and giving permission both to the plaintiffs and to the defendants to amend their pleadings. The defendants do not, in their 3rd, 7th, and 10th pleas, allege that they had such an officer as a station freight agent at Halifax to whom the notice could be given, the not giving which they plead in bar; and not having averred that they had, they consistently offer no evidence to prove that they had.

It will be competent then for the plaintiffs so to reply as to raise the question argued before us upon, as we think, insufficient material, namely—whether the eleventh condition endorsed on the shipping bill applies to a delivery at a place situate as Halifax is, viz., beyond the limits of the country in which the Grand Trunk Railway runs.

We also think that in order to raise properly the greater part of the plaintiffs' contention before us, they should amend their replication to the 3rd, 7th, 10th, and 11th pleas or add another replication, as they may be advised, setting up in answer to those pleas in substance to the effect that the defendants wilfully and wrongfully repudiated and disregarded the terms upon which alone the oil was bailed to them, namely, by wrongfully and unjustly, and wilfully, and against the will of the plaintiff, exposing the barrels containing the oil upon open platform cars, and by leaving the same so exposed for divers long spaces of time after they had received the same in charge, and before forwarding the same, and also at divers places on the route, in violation of the terms of the bailment; by which wilful misfeasance a great portion, to wit, — barrels of the oil were wholly lost, and that it is for loss so occasioned that the action is brought. In fact averring all those acts which the plaintiffs rely upon as being a wrongful and wilful departure from the terms of the bailment.

The plaintiffs may also, if they think fit, insert a count for wrongfully depriving the plaintiffs of the use and possession of a large quantity of their oil, namely, the quantity lost.

The rule will be to set aside the nonsuit, and to allow both plaintiffs and defendants to amend their pleadings generally.

We do not think that we should give costs to either party.

*Rule accordingly.*

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## MEMORANDA.

During this term the following gentlemen were called to the Bar :—

ALBERT CLEMENTS KILLAM, THOMAS HODGKIN, CORNELIUS JOHN O'NEIL, FRANCIS BEVERLEY ROBERTSON, HENRY ERNEST HENDERSON, HAMILTON CASSELS, FRANCIS LOVE, WILLIAM WYLD, THOMAS CASWELL, GEORGE EDMINSON, FREDERICK WILLIAM COLQUHOUN, EDWARD O'CONNOR, JOHN BERGIN.

## SITTINGS IN VACATION

AFTER HILARY TERM, 1877.

## REGINA V. CAVANAGH.

*Sale of liquor—Conviction for, under 37 Vic. ch. 32, O.—Objections to information and conviction—32-33 Vic. ch. 29, sec. 32, D., ch. 31, sec. 5, D.*

An information stated that defendant, "a licensed hotel-keeper in the town of Peterborough, did, on Sunday the 2nd July, 1876, at the hotel occupied by him in the said town dispose of intoxicating liquor to a person who had not a certificate therefor, &c.: and the conviction thereunder stated that the defendant was convicted "upon the information and complaint of J. R. the above named complainant, and another, before the undersigned," &c., "for that the said defendant," &c, in the words of the information.

*Held* that the person to whom the liquor was sold, should have been named or described; but that such an objection, under 32-33 Vic. ch. 29, sec. 32, D., which applies to informations, was only tenable on motion to quash the information when before the magistrate.

*Quære*, whether, 32-33 Vic. ch. 31, sec. 5, D., which enacts that no objection to any information for any defect in substance or form therein, should be allowed, would not be a sufficient answer to the objection.

*Held* also that it sufficiently appeared that the hotel was a licensed hotel at which liquor was allowed to be sold: that a sale "at" the hotel was equivalent to a sale "therein, or on the premises thereof;" and that it sufficiently appeared that the defendant was "the proprietor in occupancy or tenant or agent in occupancy."

*Held* also that the words "and another" could be treated as surplusage, it appearing in fact that J. R. was the only complainant.

ON September 4th, 1876, *Watson* obtained a rule *nisi* calling upon the Police Magistrate of the town of Peterborough, the convicting magistrate, and upon the said complainant, to shew cause why the conviction of the 12th of July last, and all proceedings therewith, should not be quashed, and the defendant be relieved therefrom, on the ground that the conviction was irregular, and not in accordance with the statute, and was contrary to law, because :

1. It does not name or otherwise describe the person to whom the liquor is alleged to have been sold, whereas such person should be described with particularity.

2. It does not shew that the place from which the liquor was sold was a place from which liquor was allowed to be sold.

3. The conviction states that the liquor was sold "at" the hotel of the defendant, which is not an expression sufficient to meet the words of the Act in that behalf.

4. It does not describe the defendant, or shew whether he is a tenant in occupancy, proprietor or otherwise, or in what way he holds or possesses the said hotel.

5. It does not negative the fact of any certificate having been produced by the agent of the defendant.

6. The conviction is founded upon the information of John Ritchie "and another," which is too indefinite and uncertain, and the costs should be made payable to both, whereas they are payable to John Ritchie only.

And on grounds disclosed in the papers filed. And why the Police Magistrate and the complainant should not pay the costs of the application.

The information stated that from what the complainant had been informed, and from what he had personally seen, he believed that the defendant, "a licensed hotel keeper in the town of Peterborough, did, on Sunday the second of July, 1876, *at the hotel occupied by him* in the said town, dispose of intoxicating liquor to a person, who had not a certificate therefor from a justice of the peace or a duly licensed physician, contrary to the statute in that behalf."

The only witness examined was *John McGolrick*. He said: "I was in the employment of the defendant on that day. He is a hotel keeper in Peterborough. There is a bar-room in connection with the hotel. I was in the bar-room on that day. I do not know that Mr. Cavanagh was in the bar-room that day. There were three or four men there from Lindsay. They came in to take off their clothes. They had some beer. I got it for them. Mr. Cavanagh is a licensed hotel keeper. \* \* It was strong beer they drank. Some of them may have drunk ginger ale."

The conviction stated that the defendant was convicted "upon the information and complaint of John Ritchie, the above named complainant, *and another*, before the undersigned \* \* for that the said Timothy Cavanagh," &c., as in the words of the information.

In Michaelmas term, November 24th, 1876, *S. M. Jarvis* shewed cause. The conviction was under the 37 Vic. ch. 32, sec. 28, O., and it is according to the form in the Dominion Act of 1869, ch. 31, secs. 42-50. It is not necessary to give the name of the person to whom the liquor was sold. The name may not be known; and by section 51, the having a light in the bar-room is evidence of selling improperly. The sale *at* the hotel occupied by the defendant shews the liquor was sold from a place from which liquor was allowed to be sold, he, the defendant, being described as a licensed hotel keeper. *Regina v. Parlee*, 23 C. P. 359, is relied on by the defendant; but this case is not in the terms of that conviction. The third objection is covered by the second. The defendant is sufficiently described as a licensed hotel keeper in the town of Peterborough, who did at the hotel occupied by him in the town of Peterborough dispose of intoxicating liquors. The agent of the defendant is of course the agent of the hotel keeper, but the agent referred to in section 28 of the Act is the agent of the vendee of the liquor, not the agent of the vendor. The objections therefore have no force or application. The words *and another* are surplusage, because it appears there was no other complainant than John Ritchie. The 39 Vic. ch. 26, sec. 21, O., must be read in connection with the prior Act.

*Watson*, contra. The conviction should be so certain that it will be an answer to any future prosecution for the same offence: *Paley* on Convictions, 5th ed., 172; and it should contain sufficient certainty: *Rex v. Catherall*, 2 Str. 900. The name of the person to whom the liquor was sold should have been given, or if it is not given, the want of it should have been excused. The conviction

shews the defendant was a licensed hotel keeper in Peterborough, and that he sold liquor at the hotel occupied by him; but it does not shew that the hotel, he is said to have occupied and sold at was a licensed hotel at which liquor was allowed to be sold: sec. 28; *Regina v Parlee*, 23 C. P. 359. A sale at the hotel is not sufficient. It should appear how the defendant occupied, whether as a "proprietor in occupancy or tenant or agent in occupancy:" sec. 34, because it is only such person who can be levied upon. The fifth objection if not rightly taken, cannot be relied upon. The words *and another* in the conviction make it defective, because that other person is as much entitled to his costs as John Ritchie.

March 2nd, 1877. WILSON, J.—If it can be said that the word *indictment*, which includes "information, inquisition, and presentment, as well as indictment;" and the term "*finding of the indictment*," which includes also "the taking of an inquisition, the exhibiting an information, and the making of a presentment"—32 & 33 Vic. ch. 29, sec. 1, sub-sec. 1 D.—apply to an information before a magistrate, then that Act, by sec. 1, will extend to ch. 31 of the same session, because it relates to criminal law, and there is nothing "in the context of the later Act" indicating a different meaning or calling for a different construction.

By section 32 of ch. 29, it is provided that "every objection to any indictment for any defect apparent on the face thereof, must be taken by demurrer or motion to quash the indictment, before the defendant has pleaded, and not afterwards," &c.

There can be no reason if the indictment in the highest criminal Court and for the gravest offence can be amended in that manner, why the information before a magistrate on a charge of this nature may not also be amended.

The expressions *information*, and *the exhibiting of an information*, in the Act before mentioned, appear rather to apply to a different kind of proceeding, namely, a criminal information filed by the Attorney-General, or by

the Master of the Crown Office ; but in *Paley* on Convictions, 5th ed., 65, the ordinary information before a magistrate is spoken of as exhibiting the information.

I see nothing, therefore, to prevent the information which was laid or exhibited to the Police Magistrate in this case from being governed by the statute referred to, ch. 29 ; so that, in my opinion, the defendant should have taken the objection to the information when he was before the magistrate, to the insufficiency of it because it did not name the person to whom the liquor was sold.

The 32 & 33 Vic. ch. 31, sec. 5, would of itself, perhaps have been a sufficient answer to the objection, because it enacts that "no objection" shall be allowed to any information, complaint, or summons for any alleged defect therein, in substance or in form, &c."

But in case that should not be sufficient to maintain the conviction if the defect is carried into it, the earlier Act shews the objection to it shall not be given effect to if the information itself could have been quashed on that ground.

The first objection is removed, in my opinion, by virtue of these provisions. If it had not been, I think it would have been a fatal objection.

The second objection is, that it does not appear that the hotel at which the liquor was sold was a licensed hotel at which liquor was allowed to be sold. The conviction shews that the defendant was a licensed hotel keeper in Peterborough, and that he did at the hotel occupied by him in the said town dispose of, &c.

The first part of the information, that the defendant is a licensed hotel keeper in Peterborough, may be taken to be a matter of description of him. It represents his calling and business in that place. The later statement, that he did at the hotel occupied by him in the said town sell liquor, does not so conclusively as it might have done shew that the hotel occupied was the house of which he was the licensed hotel keeper. But I do not feel disposed to interfere with it, because if there was anything uncertain or improper in it, and objection had been taken to it, it might

have been amended, and because I am not convinced it is so fatally bad that no offence can be said to have been committed by him upon these facts.

I was for a time much disposed to give effect to the objection, because it is possible to imagine the defendant being a licensed hotel keeper, and occupying a hotel for which he has no license—that is occupying two hotels, one licensed, the other not licensed, and selling spirituous liquors in each place. The mode of proceeding against him in the two cases would be different and the penalties also different.

That, I think, would be a somewhat forced construction to put upon the information, because it is a reasonable intendment that the hotel a licensed hotel keeper occupies, is one which he is licensed to keep.

The third objection is, that a sale *at the hotel* is not equivalent to a sale “therein, or on the premises thereof.”

But *at* fairly enough describes a sale *in* the hotel. A person who is *at* home or *at* church may rightly be understood to be *in* his house or *in* church, and one who keeps a hotel *at* such a building, may be said to keep it *in* the building.

The fourth objection is, that it does not appear the defendant was the proprietor in occupancy, or a tenant or agent in occupancy, or in what other way he held or possessed the hotel: sec. 34.

It does appear he *occupied* the hotel, and, in my opinion, that is enough, and as he was licensed to keep it, that shews he was the proper person to keep it—it shews a lawful occupation. See 39 Vic. ch. 26, sec. 21.

The fifth objection not having been rightly taken was not argued.

The sixth objection, as to the words “and another,” may be cured by treating them as they are words of surplusage.

The rule will therefore be discharged with costs.

*Rule discharged.*

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## FOSTER ET AL V. WILSON.

*Agreement—Incomplete performance—Quantum meruit—Mitigation of damages.*

By an agreement between the parties, dated 21st October, 1872, plaintiffs, who were advertising agents, agreed to place defendant's cards in the top space of their advertising frames in 100 railway stations, specified, and to hang his cards in all the railway stations under their control where it did not appear in the frames, for five years, the defendant to pay therefor \$200 per annum, by quarterly payments. The plaintiffs only inserted the cards in frames at ninety-nine stations, and not in all cases, though usually, at the top, and hung them up separately in 144 stations; but they did not properly maintain the cards, there being in 1875, sixteen places where cards were not in the frames, and about forty where they were not at the top, and similar defaults occurred in 1873. The defendants paid the first quarter's payment, but refused to pay more, on the ground that the contract was not performed, but it was proved that though they were aware that plaintiffs were not literally performing the contract, they never notified them to discontinue the advertisements.

*Held*, that plaintiffs might recover the actual value of their services on a *quantum meruit*, the defendants, if damnified, being entitled to claim a reduction from the contract price for the default, or to bring a cross action therefor.

DECLARATION: That the defendant, on the 21st October, 1872, under the name and style of Archdale Wilson & Co., agreed with the plaintiffs, as proprietors of the Railway Advertising Company, in consideration of their inserting defendant's cards in the top place of the depot frames of the plaintiffs at the following places, to wit, at the following stations of the Grand Trunk Railway, the Great Western Railway, the South Eastern Railway, and the Shefford and Sharnbury Railway, (setting them out,) to pay the plaintiffs the sum of \$50 per quarter, and to pay the same quarterly. And the said advertisement was duly inserted in the top space of said depot frames, during ten quarters, at said places as aforesaid. And all conditions were fulfilled, &c., yet the defendant has not paid the said sum of \$50 per quarter or any part thereof, and the same remains unpaid.

The common counts were added.

Pleas. To first count: 1. That he did not promise as alleged.

2. That the said advertisement was not duly inserted by the plaintiffs in the top space of the said depot frames during ten quarters, at the places therein stated, as therein alleged.

### 3. Payment.

To the common counts: Never indebted; payment; and a special plea: that, before the commencement of this suit, the plaintiffs, under and in pursuance of the statute in that behalf, duly assigned and transferred the said debt and chose in action to the railway and newspaper advertising company, a body corporate and politic duly incorporated by letters patent of incorporation under the great seal of the Dominion of Canada. Issue.

On the cause coming on for trial before Galt, J., without a jury, at the Fall Assizes of 1875, it was referred by the usual *Nisi Prius* submission to the award of J. J. Burrows, Esquire, County Judge, with the addition that the arbitrator, at the request of either party, was to state a case for the opinion of the Court and to find specially on the issues.

The case was duly heard before the arbitrator, who made his award as follows:—

“This case was referred to me by a *Nisi Prius* order. The agreement to refer contains a direction to find specially on the issues, and to state a case for the opinion of the Court at the request of either party. The defendant requests me to state such a case.

“Upon the issue arising on the first count of the declaration, except that arising on the third plea, I find a verdict for the defendant.

“Upon the issues arising on the second or money counts, I find a verdict for the plaintiffs, subject to the opinion of the Court upon the following case, and I assess the damages of the plaintiff by reason of the premises contained in the second count at the sum of \$344.44, and I direct a verdict to be entered for the plaintiffs for that sum, if the Court shall be of opinion that a verdict should be entered for the plaintiffs; otherwise I direct a verdict for the defendant.”

### CASE.

The plaintiffs, Foster & Co., were advertising agents in

Montreal. They sold their business to the Railway Advertising Company of Montreal. The defendants were a firm of retail druggists in Hamilton. On 21st October, 1872, an agreement was made between the plaintiffs and the defendant, which is contained in two documents, produced. These form one agreement, of which the material parts are that the plaintiffs (having the right of exhibiting or posting advertisements in certain Railway stations), agreed to pay half the cost of printing the defendant's card containing the defendant's advertisements, and to insert such card in the top space of their advertising frames, to be exhibited in 100 railway stations, of which the names are endorsed upon the exhibit No. 1. The plaintiffs also agreed to hang the defendant's card which the defendant should prepare in all the railway stations controlled by the plaintiffs in which such card did not appear in the plaintiffs' frames. The cards were to be kept in the depot frames in 100 stations, and hung up separately in all other stations controlled by the plaintiffs for the term of five years. In consideration of these services, the defendants were to pay the plaintiffs \$200 per annum by quarterly payments, commencing on 10th January, 1873.

The railway stations at which the plaintiffs had the right to put up advertisements are specified in exhibits produced. They appear to be 340 in number.

The plaintiffs put up the defendant's cards in their frames in 100 frames at 99 stations, but they were not in all cases placed in the top space or compartment of the frame, but usually at the top, at the stations controlled by the plaintiffs. Where they had no frames, they hung the defendant's cards separately at 144 stations. These separate cards are called maps, being in the shape of maps on rollers.

The plaintiffs did not maintain the cards so put up in their places; but on the contrary, in the year 1875, there were sixteen places where cards should have been in frames, but where there were none, and about 40 where they were not placed at the top of the frames according to agreement, and similar defaults were shewn in 1873.

The plaintiffs made a draft on the defendants for the first payment of \$50, which the defendants accepted and paid. The defendants refused any further payment, on the ground of non-performance of the contract.

The defendant contends that, inasmuch as the plaintiffs did not at any time fully and completely perform the work, which they had contracted to have at that time fully performed, they are entitled to recover nothing.

December, 8th, 1876. *Britton*, Q. C., for the plaintiffs. The arbitrator should have found on the evidence that the *top* place in the frame was not the best place for the defendant, and that where the defendant's card was placed—in the middle part in some frames, and in the bottom part of others, and occasionally at the top—was really better for the defendant than if the cards had been all placed at the top. If that be so, the case should be remitted to the arbitrator to find upon that fact, unless the Court can decide the matter fully upon the case just as it is stated. The real question is, whether the defendant derived any benefit from the plaintiffs' services, and accepted them. If so, he is bound to pay, although the plaintiffs did not do all they had engaged to do: *Hamilton v. Myles*, 24 C. P. 309. The defendant, who lives at Hamilton, saw that his card there was not at the top of the frame and never complained: *Davies v. Appleton*, 25 C. P. 376; *Bettini v. Gye*, L. R. 1 Q. B. D. 183.

*M. C. Cameron*, Q. C., for the defendant. The contract was entire, and unless the plaintiffs fully performed it they are not entitled to recover. Half performance by them does not mean that the defendant got half the benefit that he bargained for. He has not got what he contracted he should get, and that is a proper answer to the whole claim: *Addison* on Contracts, 7th ed., 664; *Sinclair v. Bowles*, 9 B. & C. 92; *Bates v. Hudson*, 6 D. & R. 3.

March 2nd, 1877. WILSON, J.—The bargain was, that the defendant should furnish the advertising cards which were to be hung in the railway stations, 100 to be inserted in frames, and 240 to be hung up as maps in such stations in which there were no frames. There were 99 frames put up in different stations, in which the defendant's card appeared, and 144 cards hung up in other stations.

The plaintiffs did not maintain the frame advertisements, for in 1875 there were sixteen places where cards should have been in frames, but they were not there. Nor did the

plaintiffs put the defendant's cards at the top place in the frames in all cases; for in about 40 of the frames the defendant's cards were in the middle or at the bottom of the frames.

The evidence of the defendant himself, which accompanies the case, shews he never told the plaintiffs to discontinue his advertisements, although he knew they were not performing literally the contract between them.

The consideration which the defendant was to give for the plaintiffs' part of the bargain does not go "to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiffs a thing different in substance from what the defendant has stipulated for": per Blackburn, J., in *Bettini v. Gye*, L. R. 1 Q. B. D. 183, 188.

"It merely partially affects it and" it (the breach of contract) "may be compensated for in damages": *Ib.*

In *Graves v. Legg*, 9 Ex. 709, Parke, B., said, at p. 716: "The reason of the decision, \* \* besides the inequality of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust, that because he had not had the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it."

This is plainly a case in which the plaintiffs have performed by far the greater part of their contract, and although not in the precise terms of it, yet in a manner quite as beneficial to the defendant as a literal performance of it would have been. The defendant has received a great part of the service he bargained for,—a service divisible in its nature, and which he never desired to be discontinued, and which he received with a knowledge of its imperfect performance.

It is just, therefore, that the plaintiffs should be paid for the services they have rendered, and it is not just that the defendant should, while not informing the plaintiffs to stop such services, receive the benefit of them and then decline to pay for them, such as they have been.

If he is damnified by the plaintiffs not perfectly doing their part, he should claim a reduction in this action from the plaintiffs' demand, or he may bring a cross action to recover damages by way of compensation for the loss he has sustained.

In my opinion, the finding of the arbitrator in favour of the plaintiffs is correct. The verdict which he found will therefore stand; and there will be judgment for the plaintiffs.

*Judgment for plaintiffs.*

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WILLIAMS V. THE CORPORATION OF THE TOWN OF PORT HOPE.

*Sheep killed by dogs—Compensation—Towns—Liability of—32 Vic. ch. 31, O.*

*Held*, that the 32 Vic. ch. 31, O., which requires municipalities to provide compensation to the owners of sheep killed by dogs, for the damage they have thereby sustained, is not confined to county municipalities and to municipalities within their jurisdiction, but applies also to towns which have withdrawn from the jurisdiction of the county.

THIS was a special case stated for the opinion of the Court without any pleadings as follows :

1. This action is brought to recover the sum of \$96, which the plaintiff claims to be entitled to, and that it was the duty of the defendants to have awarded to him, for compensation for the damages sustained by him by the killing of twelve of his sheep by dogs in the municipality of the said town of Port Hope.

2. It is admitted that the plaintiff was the owner at the time they were killed of twelve sheep, which were killed by dogs on the 12th of August, 1875.

3. That the said sheep were so killed on a part of the plaintiff's farm, which was on the said last mentioned day occupied by him, and was wholly enclosed by lawful fences, and was and is situated within the said municipality.

4. That the owner or keeper of the said dogs was not and is not known.

5. That the council of the said municipality was and is satisfied that the plaintiff has made diligent search and enquiry to ascertain the owner or keeper of the said dogs, and that such owner or keeper cannot be found.

6. That the plaintiff sustained damages by the killing of the said sheep by dogs, as aforesaid, to the amount of \$144, and that he applied to the council of the said municipality for compensation for the said injury within three months.

7. That there is now, and for some years past has been levied annually, in the said town of Port Hope, upon the owner of each dog therein, a tax of \$1.00 for each dog and \$2.00 for each bitch.

8. That the council of the united counties of Northumberland and Durham (in which united counties the said town of Port Hope is situated) has not dispensed with the levy of the tax imposed by the Act 32 Vic. ch. 31, O., and intituled "An Act to amend the Act imposing a tax on dogs and for the protection of sheep," and has not declared by by-law or otherwise that the said tax shall not be levied in any of the municipalities within its jurisdiction; and that the said county council has not by by-law or otherwise declared that the application of the proceeds of the tax established by the said Act, provided by the said Act, shall be dispensed with.

9. That the town of Port Hope is now, and for some years past has been, withdrawn from the jurisdiction of the council of the said united counties, under the provisions of the law respecting municipal institutions.

10. That the assessors of the municipality of the said town of Port Hope did in the year 1875, and for some years past, enter on their rolls opposite the name of every person assessed, and also opposite the name of every resident inhabitant not otherwise assessed, being the owner or keeper of any dog or dogs, the number by him or her owned or kept, in a column prepared for the purpose; and that the collector's roll did contain the name of every person entered on the assessment roll as the owner or keeper of any dog or dogs, with the tax of \$1 for every dog and \$2 for every bitch imposed as aforesaid, in a separate column; and that the collector of the said town did, in

the year last aforesaid, and for several years past, collect the said tax, and made returns thereof to the treasurer of the said town, as required by law; and that no sum of money has been, in the year last aforesaid, awarded or paid by the council of the said town for compensation for damages sustained by the killing or injuring of sheep by dogs.

11. That, if the said Act 32 Vic. ch. 31, extends, and is applicable, to such a municipality as the town of Port Hope, the plaintiff is entitled to have awarded to him by the council of the said municipality and to receive from defendants for compensation for his said loss, the sum of \$96, being two-thirds of the amount of the damages sustained by him.

12. It is contended for the plaintiff that the said Act 32 Vic. ch. 31, extends, and is applicable, to the municipality of the said town of Port Hope.

13. It is contended for the defendants that the said Act does not extend to, and is not applicable to the municipality of the said town of Port Hope, amongst other reasons, the said town being withdrawn from the united counties of Northumberland and Durham.

The question for the opinion of the Court is, whether or not the said Act extends and is applicable to the municipality of the said town.

If the Court shall be of opinion that the plaintiff's contention is correct, judgment shall be entered for the plaintiff for \$96 damages, with his full costs.

If the Court shall be of opinion that the defendants' contention is correct, judgment shall be entered for the defendants with their costs.

On November 2nd, 1876, the case was argued.

*T. M. Benson*, for the plaintiff.

*Osler*, for the defendants.

March 2nd, 1877. WILSON, J.—The statutes applicable to the case are 32 Vic. ch. 31, O., and the amended Act 39 Vic. ch. 30, O., and the Municipal Act of 1873, sec. 379, sub-sec. 10.

The plaintiff's sheep were killed by dogs in the town of Port Hope. The town at that time was, and for some time before it had been, withdrawn from the jurisdiction of the county council; and the question is, whether the town is liable for the loss of the sheep under the first of the statutes just mentioned.

The question is one of construction and interpretation only, and it is, whether the statute applies to towns which have withdrawn from the jurisdiction of the county councils; or, in other words, whether the statute applies to any municipality which is not within the jurisdiction of the county.

The former Act, 29 Vic. ch. 39, contained the following as the first section: "There shall be levied annually in every municipality in Upper Canada, upon the owner of each dog therein, an annual tax of \$1 for such animal"; and that clause was amended by the 29 & 30 Vic. ch. 55, which, after the words "*one dollar for*," contained "each dog and two dollars for each bitch."

In the 32 Vic. ch. 31, sec. 2, O., the same provision as last amended is re-enacted, but the following addition is made to it: "Provided, however, that in case the council of any county or union of counties, may deem it advisable to dispense with the levy of the said tax, it may be lawful for such council to declare by by-law that the said tax shall not be levied in any of the municipalities within its jurisdiction; and immediately upon the said by-law having been passed, shall cause its clerk to transmit a copy of the same to the assessor or assessors of every municipality so within its jurisdiction."

That section is again amended by the 39 Vic. ch. 30, which adds the following proviso to it: "Provided always that the said county by-law shall not apply or have effect in any municipality whose council by by-law declares that this Act shall be in force in any such municipality."

By the two earlier Acts, the money collected for the dog tax "shall constitute a fund for satisfying such damages as may arise in any year from dogs killing or injuring sheep or lambs in such municipality."

By sec. 8 of the first Act, "two justices of the peace *in the municipality*" are to enquire into the matter, upon a complaint made of any sheep or lamb having been killed or injured by a dog.

By sec. 8 of the second Act, the enquiry is to be made by "two justices of the peace *for the county*." But by the 32 Vic. ch. 31, sec. 7, any justice of the peace may act.

And by sec. 9, if the council of the municipality has paid the loss because the owner of the dog cannot be found, and the owner is afterwards discovered, the clerk of the municipality may "make complaint before a justice of the peace *for the county*, who shall summon such reputed owner, and any two justices of the peace shall proceed to try the case," &c. But that enactment is not continued by the 32 Vic. ch. 31.

And by sec. 13 of the second Act, it is enacted, "In case where parties have been assessed for dogs and the *township* collector has failed to collect the taxes authorized by this Act, he shall report the same under oath to any justice of the peace, and such justice may order such dogs to be destroyed." That clause is continued by the 32 Vic. ch. 31, sec. 13.

Excepting for these differences in secs. 8, 9, and 13, in the second Act, the first and second Acts are in other respects so worded that there is nothing in either of them to indicate that the general enactments do not apply to all municipalities.

The tax itself is to be levied "in every municipality in Upper Canada," and the money levied by it is to "constitute a fund for satisfying such damages as may arise in any year from dogs killing or injuring sheep or lambs in such municipality."

Both of these Acts, and the third Act also, always refer to the clerk or *treasurer*.

At that time a city had no treasurer, but a chamberlain. But that did not apply to towns. And towns, by the Municipal Act of 1866, had the power "to withdraw from the jurisdiction of the council of the county."

In the third Act before mentioned, that is, the 32 Vic. ch. 32, what is there to prevent its extending to towns as well as to townships?

Reading that Act of course with the provisoes added to the second section before mentioned.

Then the third section enacts that "the assessor or assessors of every municipality, within which this Act shall not have been dispensed with, as provided in the foregoing section, shall, at the time of making their annual assessment, enter on the roll opposite the name of every person assessed, and also opposite the name of every resident inhabitant not otherwise assessed, being the owner or keeper of any dog or dogs, the number by him or her owned or kept, in a column prepared for the purpose."

By sec. 6, the money raised is to form a fund for purposes in the earlier Acts provided.

Sec. 13, as before mentioned, refers to the *township* collector who has failed to collect the dog tax, procuring the dog to be killed by an order of a magistrate.

Secs. 3, 14, 17 and 18 refer to the dispensing powers of the county council.

The only matters, therefore, apparently opposed to the Act in question extending to towns is, the expression "township collector" in sec. 13 just mentioned.

And the only matters, apparently, opposed to the Act extending to towns which have withdrawn from the jurisdiction of the county council, are the expressions in sec. 13 just cited; and secs. 2, 3, 14, 17, and 18, relating to the dispensing powers of county councils.

All these sections are governed by the one consideration, namely: Is the Act only confined to county municipalities, and to municipalities within the jurisdiction of the county council?

I am not certain that the primary idea was not to protect the sheep in rural municipalities only from the ravages of dogs. And, in order to do that, the purpose which is plainly expressed was to tax the dogs "in every municipality in Ontario."

It was just as bad to have a country sheep killed by a town or city dog as by a country dog, and just as bad to have a country sheep killed by a country dog which came from a different part of the country as by a dog which belonged to the same municipality.

The object then was to protect farmers' sheep, and to tax every body's dog for that purpose.

I say that was, as I think, the primary idea of the framer of the Act.

But I think he has not properly confined his legislation as he may have intended to do.

The owner of every dog in every municipality in Ontario is taxed for every dog he keeps, and he is bound to pay the tax ; and the money so raised, it is declared, "shall constitute a fund for satisfying such damages as may arise in any year from dogs killing or injuring sheep or lambs in such municipality."

And there is no reason why the sheep in towns, such as Port Hope, should not be protected after they have been bought from the farmers against the attacks of all dogs, town or country bred, just as they were protected while they were in the country.

I do not think the dispensing power which county councils have can be held to limit the general and comprehensive language of the statute.

The main purpose of the legislation as expressed by the statute was, to protect sheep and to destroy dogs that did damage to sheep, and to recompense the owners of sheep for the loss they had suffered, and to punish the dog owners as well as the dogs.

It is notorious that sheep are, and must be, kept in large numbers in villages and towns, and even in cities, and that they are more exposed to damage from dogs there than sheep are in the country. These places are infested by a concentrated dog community—vagrants and uncared for—that are always on the watch for something to prey upon, and where one bad dog can get at any time a dozen good dogs to help him.

I am of opinion that the Act in question does extend to the town of Port Hope.

The judgment will therefore be for the plaintiff.

*Judgment for the plaintiff.*

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ROCHE V. WALSH.

*Agreement—Mutuality—Master and servant.*

By an agreement signed by both the parties, plaintiff agreed and bound himself to defendant to act as his book-keeper, &c., for five years, for a specified sum in each year, and to pay \$10 per month for board, to be deducted from his salary, and also to pay his washing and other personal expenses. It was added: "This agreement to commence from 1st February, 1876, and end 1st February, 1880."

*Held*, that there was no obligation, either express or implied, on the defendant to continue his business or retain the plaintiff in his employment during the five years.

DEMURRER. Declaration. First count: that in consideration the plaintiff would enter into the service of the defendant for five years from the 1st of February, 1876, as book-keeper, salesman, or traveller, at the wages of \$425 for the first year, and an increase of \$100 per annum for each subsequent year, the defendant promised the plaintiff in writing to retain him in the said service during the said five years in the capacity and on the terms aforesaid; and the plaintiff entered into such service in the capacity and on the terms aforesaid, and continued therein for a part of the said five years, and until the breach of the said promise, and was always ready and willing to continue in the said service during the remainder of the five years, whereof the defendant had notice, yet the defendant, before the expiration of the five years, wrongfully dismissed the plaintiff from the said service and refused to retain him for the remainder of the five years, whereby, &c.

Fourth plea to the first count: that the alleged promise was in writing, and is in the words and figures following:

“10th January, 1876.

“I” [meaning the plaintiff], “do hereby agree and bind myself to Walsh & Co., to act as book-keeper, salesman, or traveller, for the term of five years, in consideration of the following sums annually, viz.: First year, \$425; second year, \$525; third year, \$625; fourth year, \$725; fifth year, \$825. The undersigned” [meaning the plaintiff] “also further agrees to pay the sum of \$10 per month for board, which will be deducted from the above sums; his washing and other personal expenses to be paid by himself. This agreement to commence from the 1st February, 1876, and ends 1st February, 1881.”

(Signed) “JOHN ROCHE.”

(Signed) “W. WALSH & Co.,”

which is the promise and agreement in the first count mentioned.

To this plea the plaintiff demurred, on the grounds, that this plea discloses no legal answer to the cause of action in the first count mentioned, and admits the agreement and breach thereof, without avoiding the same.

The case was argued on the 24th of November, 1876.

*J. B. Clarke*, for the demurrer. The agreement is signed by both parties, and the words of the instrument must be construed to be the words of each of them, so far as they are applicable to each one. The defendant by his signature has assented to the terms contained in the writing, and there is therefore a complete agreement: *Pilkington v. Scott*, 15 M. & W. 657; *Regina v. Welch*, 2 E. & B. 357; *Bealey v. Stuart*, 31 L. J. N. S. Ex. 281; *Hartley v. Cummings*, 5 Q. B. 247.

*Clute*, contra. The writing set out shews there is no such agreement as the plaintiff has declared upon. There is more than is here to be found required to constitute an agreement binding on the defendant: *Dunn v. Sayles*, 5 Q. B. 685; *Aspdin v. Austin*, 5 Q. B. 671; *Williamson v. Taylor*, 5 Q. B. 175; *Churchward v. The Queen*, L. R. 1 Q. B. 173, 195.

March 2nd, 1877. WILSON, J.—This is a contract which, by the Statute of Frauds, is required to be in writing.

Both parties have signed it, but the words are, it is said, the words of the plaintiff only, and not of the defendant, so that the defendant is not liable. Are the concluding words, "This agreement to commence from the 1st of February, 1876, and ends 1st February, 1881," the language of both parties; and, if so, what do they mean?

Do they shew a mutuality of contract? Do they mean more than that the agreement of the plaintiff should be good for five years? Do they mean that the defendant will continue his business for five years, and that he will retain the plaintiff for that time in his service?

The cases of *Williamson v. Taylor*, 5 Q. B. 175; *Aspdin v. Austin*, 5 Q. B. 671, and *Dunn v. Sayles*, 5 Q. B. 685, shew that it requires clear language to bind the employer to that extent.

In the last case an action of covenant was brought, which stated that the plaintiff agreed that D. should serve the defendant for five years from the date of the instrument, and that the defendant, in consideration of the services to be performed by D., should pay D. during the five years so much per week. And the Court held it was no breach of the covenant the defendant dismissing D. before the expiration of the five years, because he had not engaged to retain him in his service for that period.

In *Sykes v. Dixon*, 9 A. & E. 693, the Court held that a memorandum in writing, signed by the workman only, that he would work for the plaintiff and for no other person from the date of the writing for twelve months, and so from twelve months to twelve months, until he should give the plaintiff twelve months' notice in writing that he should quit his service, was altogether on one side, and that the plaintiff was not bound to employ the man.

In *Pilkington et al. v. Scott*, 15 M. & W. 657, the agreement was, that Leigh would serve the plaintiffs for seven years, to be computed from that date, and that he should not during that time work for any other person: that the

plaintiffs should deduct from Leigh's wages any fine for breach of rules: that they should pay Leigh during any depression of trade a moiety of his wages: that if Leigh should be sick or leave, the plaintiffs should be at liberty to employ any other person in his stead without paying Leigh any wages: that the plaintiffs should pay him so long as he continued to be employed wages by the piece, and £8 per annum in lieu of house rent and firing, and that the plaintiffs should have the option of dismissing him from their service or giving him a month's wages or a month's notice.

And it was held the contract was a valid one.

Alderson, B., said, at p. 660: "Looking at the agreement altogether, I see sufficient to satisfy me that they are bound to employ him. \* \* All these provisions being taken together, it appears to me that the agreement points clearly to an undertaking on the part of the masters to employ the workman for seven years, subject to the notice, and on the part of the workman to serve them for that period on the same terms."

So in *Hartley v. Cummings*, 5 C. B. 247, it is said: "The engagement on the part of the master, in the event of the particular goods not being wanted, to find the servant other work that shall produce the prescribed amount of wages, exhibits sufficient mutuality": per Maule, J., p. 260.

In *Regina v. Welch*, 2 E. & B. 357, Lord Campbell said, p. 362: "Is there not here a necessary implication that the employer shall find reasonable work, and pay for the articles manufactured"?

The case of *Emmens v. Elderton*, 13 C. B. 495. H.L., was a case where it was held, "There is, upon the true construction of this agreement, an implied agreement upon the part of the defendants below to retain the plaintiff, and to employ the plaintiff, in the sense in which I understand this word, for one year at least": per Parke, B., p. 534.

And in *Whittle v. Frankland*, 2 B. & S. 49, where the agreement was signed by both parties, the workman

engaged to serve a coal company for wages to be paid fortnightly, and the company, in consideration of such service, agreed the workman should not be discharged without twenty-eight days' notice in writing, unless in case of misconduct.

Cockburn, C. J., said, at p. 59: "From these two stipulations I think it arises by implication that the employer will find the appellant work, and will not discharge him from the service before a certain time. It would be perfectly illusory to hold otherwise; and, if this be so, there can be no objection to the contract on the ground of mutuality."

In *Churchward v. Regina*, L. R. 1 Q. B. 173, 195, Cockburn, C. J., says: "Although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions on which you must imply—although the contract may be silent—corresponding and correlative obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. Where the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the things necessary for the completion of the contract. \* \* If A covenants or engages by contract to buy an estate of B, at a given price, although that contract may be silent as to any obligation on the part of B to sell, yet as A cannot buy without B selling, the law will imply a corresponding obligation on the part of B to sell. \* \* Numerous other cases might be put of the same kind; but in all these instances, where a contract is silent, the Court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it is intentionally silent; and, above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties. This I take to be a sound and safe rule of con-

struction with regard to implied covenants and agreements which are not expressed in the contract."

See also *McIntyre v. Belcher*, 14 C. B. N. S. 654.

I think the agreement, although signed by both parties, does not bind the defendant to continue his business for five years, and to find employment for the plaintiff for that time. There is not sufficient in it to warrant an implication of that kind.

In all the other cases in which mutuality was held to exist, there was something beyond anything which is contained in this agreement; such as a clause that the employed should not be dismissed without a certain notice, or that during sickness another person might be employed in his stead.

In the absence of any such provision of that kind, an implied contract by the defendant to retain the plaintiff cannot be presumed, and there is nothing like express language binding the defendant to any such engagement.

Judgment will therefore be for the defendant on the demurrer.

*Judgment for defendant.*

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## TWEEDLIE V. BOGIE.

*Seduction—Action by brother—Pleading—C. S. U. C. ch. 77.*

Declaration for the seduction of one C. T., alleging that at the time of the seduction she was the sister and servant of the plaintiff, whereby, &c. Plea: that at the time of the child's birth C. T.'s father was dead, and her mother was then and still is alive and a British subject, and at the commencement of the action was and still is a resident of the Province; and that C. T. is her legitimate daughter.

*Held*, declaration good, and plea bad; for the declaration shewed a common law right in the plaintiff to maintain the action; and the plea did not shew enough to divest it under the statute in favour of the mother.

DECLARATION, for the seduction by the defendant of Christina Tweedlie, alleging that she was at the time of the seduction the sister and servant of the plaintiff, Robert Tweedlie, whereby, &c.

Third plea: that at the time of the birth of the said child the father of the said Christina Tweedlie was dead: that at the time of the birth of the said child the mother of the said Christina Tweedlie was living, and still is living: that at the time of the birth of the said child, and ever since, the mother of the said Christina Tweedlie was and still is a British subject; and at the time of the commencement of this action she was and still is a resident of the Province of Ontario: that the said Christina Tweedlie is the legitimate daughter of her mother, and that the said mother of the said Christina Tweedlie was at the commencement of this suit, and has ever since been, and still is, a resident in the Province of Ontario, as aforesaid.

To this plea the plaintiff demurred, on the grounds: 1. That the said plea does not shew that this action was brought within six months from the birth of such child born in consequence of the said seduction. 2. That the said plea does not allege that the said mother of the said Christina Tweedlie had not, before her seduction by the defendant, abandoned her, and refused to provide for, and retain her as an inmate.

The defendant joined in demurrer, and took the following exceptions to the declaration:

1. That it is not alleged in the said declaration that the father and mother of the said Christina Tweedlie are dead, nor that they were not resident in the Province of Ontario at the time of the birth of the said child, or that, being residents therein, they did not bring an action for the alleged seduction within six months from the birth of the child.

2. That it is not alleged in the said declaration that the said Christina Tweedlie was an unmarried female, or that six months had elapsed between the birth of the child and the commencement of the action, and that the father had not brought an action within that time, or that, if dead, the mother had not brought an action; and that the said declaration is in other respects bad in law.

On December 7th, 1876, the demurrer was argued.

*Osler*, for the plaintiff. The plaintiff describing himself as master is sufficient, although he also describes himself as a brother. The plaintiff was not called upon to make all the allegations in his declaration, the want of which has been excepted to. The plea does not defeat the plaintiff's action, because the mother is not shewn to have exercised her right in proper time, or to be entitled to maintain the action as against the plaintiff. It was for the defendant to shew in his plea everything which would make the declaration a defective one: *Hogan v. Aikman*, 30 U. C. R. 14; *McIntosh v. Tyhurst*, 24 U. C. R. 443; *Whitfield v. Todd*, 1 U. C. R. 223; *Paterson v. Wilcox*, 20 C. P. 385.

*S. Richards*, Q. C., contra. The pleadings read together shew the plaintiff has not the right to sue. As a brother the plaintiff cannot sue while the father or mother is living: *Whitfield v. Todd*, 1 U. C. R. 223. The parent has the right of action, and the master has not the right to sue, unless under the special circumstances contained in the statute, Consol. Stat. U. C. ch. 77, secs. 1-3, which confers upon him the right to sue: *Lake v. Bemiss*, 4 C. P. 430; *McIntosh v. Tyhurst*, 23 U. C. R. 565; *Smith v. Crooker*, 23 U. C. R. 84; *Green v. Wright*, 24 U. C. R. 245;

*Cross v. Goodman*, 20 U. C. R. 242; *Cromie v. Skene*, 19 C. P. 328. The right of action being with the parent, it is for any one else who assumes it to shew he is entitled to do so. If the facts set out in the plea had been contained in the declaration, the count would have been bad. The plaintiff should have replied the proper facts.

March 2nd, 1877. WILSON, J.—The statute confers the right of action upon the father of the young woman in the first place, and, if he is dead, then upon the mother: Consol. Stat. U. C. ch. 77, sec. 1.

And in case they had abandoned her before her seduction, and had refused to provide for and retain her as an inmate in their family, or they were not resident in the province at the birth of the child, or, if resident therein, they have not brought an action within six months from the birth of the child, any other person who may be entitled at the common law to sue may bring the action: secs. 2, 3

Here the father is shewn to have been dead at the time of the birth of the child by the defendant's plea, and the mother is shewn to be living. And it is said the plaintiff, as brother and master of the young woman, cannot sue as he is doing at the common law, unless he shew in his declaration that he has acquired a vested cause of action in preference to, or to the exclusion of the mother; and that he can only do that by averring in the count, if he can do so, that the mother had abandoned and had refused to provide for the daughter before her seduction, or that the mother was out of the Province at the time of the birth of the child, or if resident in it, that she had not brought an action within six months from the birth of the child.

In this case the plaintiff has, and always had, a common law right to bring this action. He has not been divested of it. His right may be interfered with or entirely taken away from him if certain other persons who have special statutory preferences shall take the benefit, if it be one, which the statute confers upon them.

It cannot be necessary by any rule of pleading for the

plaintiff to shew he has more than a valid common law right to bring the action. It is not for him to shew that the parents are dead, or are absent from the province, or that they had abandoned the girl, or that they have failed to sue within the six months from the birth of the child.

It may be anticipating a number of matters which it may not be the intention of the defendant to deny. In *qui tam* actions, in which the plaintiff has no cause of action until he brings his suit, he must prove as a part of his case that he has brought his action in due time, otherwise he has no claim whatever: 2 *Wms.* Saund. 63, note *b*, 63, note *i*.

But it is different when the statute is relied on as a defence to defeat a vested legal right. There the defendant must specially plead.

In *St. John v. St. John*, Hob. 78, the plaintiff sued the defendant, bailiff of Stockbridge, for not returning him burgess of the town. The statute was, that the sheriff shall send his precept to the mayor, and if there be no mayor, then to the bailiff. The plaintiff declared that the sheriff had made his precept to the bailiff, without shewing there was no mayor, and it was moved in arrest of judgment. But the Court held that they would not intend there was a mayor, except it be shewed, and, if there were one, it should come more properly from the other side.

See also *Sir Ralph Bovy's Case*, 1 Ventr. 217.

In *Brine v. Great Western R. W. Co.*, 2 B. & S. 402, the plaintiff declared that the defendants wrongfully raised an embankment near the plaintiff's house, causing large quantities of water to flow against and into his house. The defendants justified these acts under certain Acts of Parliament. The plaintiff replied that, although the embankment was raised under the Acts of Parliament, the flowing of the water complained of was occasioned by the wrongful construction, and the negligent and improper raising of the embankment, and the want of proper drains to the same. And it was held on demurrer to be no departure. That "the plaintiff was not called upon to

anticipate the defence by shewing that the works were not justified by reason of an Act of Parliament which might never be set up. Such mode of pleading would probably be improper, and the matters alleged would probably have no effect on the subsequent pleadings, and be treated as merely idle": p. 413.

In *Hollis v. Marshall*, 2 H. & N. 755, it was held where a statute gave the right of action to the party grieved, or to whomsoever else should sue with the consent of the Attorney-General, that as the plaintiff was not a party grieved, the declaration was bad for not averring the consent of the Attorney-General, for that was the only right which the plaintiff could have to maintain the action.

I hold the declaration to be sufficient.

The plea which shews that the mother is still living, and that she was at the time of the commencement of the suit, and still is, a resident of the Province, does not shew sufficient to divest the cause of action which the plaintiff has at the common law, nor does it preclude him from maintaining this action, because she may, although still living, and a resident of the Province at the birth of the child, and from thence until this time, not be entitled to bring an action against the defendant for the matters in the declaration contained.

She may before the seduction have abandoned her and refused to provide for her as an inmate of her family, or the six months allowed to her within which to bring her action may have elapsed before the commencement of this suit; and, if either of these facts be true, the mother has no right to sue the defendant, nor can the plaintiff's rights be affected. And it was the duty of the defendant to shew such a right and claim existing in the mother as to preclude the plaintiff from maintaining this suit.

If all of these matters were true at the time of the commencement of the action, or at the time of plea pleaded, and if before replication the mother died, or the six months were completed and no action had been brought by the mother, so that the common law right of the plaintiff to sue

became absolute, I am of opinion that it will be found such a replication would be a good answer to the plea.

It may be that a release by the mother, even when her rights were not barred, given to the defendant of all her *individual* rights of action, subject however to the claim of the plaintiff as master of the young woman to maintain an action as at the common law against the defendant for such seduction, and a waiver given by her to the plaintiff of her right to bring any such action, and an assignment of all necessary rights so far as she has or is entitled to the same made by her to the plaintiff, might be a good replication to any plea set up by the defendant of the parents' rights against the common law rights of the master where they never intended to enforce them.

I should be disposed to go far to give substantial effect to the statute in order to get rid of the many difficulties with which this very apparently simple statute is already complicated.

Judgment for the plaintiff on demurrer.

*Judgment for plaintiff.*

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## LYONS V. THE GLOBE MUTUAL FIRE INSURANCE COMPANY.

*Mutual insurance—Assessment—Forfeiture—Waiver.*

To an action on a policy of insurance, dated 18th February, 1874, for three years, defendants pleaded the non-payment of an assessment made on 24th December, 1875, of \$13.34, on the plaintiff's premium note, payable within thirty days; setting out the particulars, whereby the policy became void.

The plaintiff replied, that on 1st August, 1876, defendants directed a further assessment of \$13.34 on plaintiff's note for the period between the 18th July, 1876 and 18th February, 1877, of which they notified the plaintiff on the 2nd September, 1876, who thereupon paid defendants \$27.88, in full for said two assessments, and interest on first assessment from the date of its being payable, which defendants accepted, and thereby waived the forfeiture.

*Held*, replication good, without alleging that such payment was before the fire, for it shewed that defendants treated plaintiff as insured with them when they called on him to pay long after the alleged default, and that when the loss happened the policy was an existing risk.

ACTION on a policy of insurance, dated 18th February, 1874, for \$800, namely, \$200 on a carriage shop, and \$600 on a blacksmith shop adjoining, for three years, alleging a loss by fire, and averring performance of all conditions precedent.

Second plea: that the plaintiff, to secure the payment of the premium of the sum of \$80 on said policy, deposited with the defendants his undertaking for the payment of such \$80 at the time of said insurance; and that afterwards, on 24th December, 1875, the defendants declared an assessment of \$13.35, upon the said undertaking, payable within thirty days from the said 24th December, 1875, to the secretary of the company at Brantford: that a notice containing the particulars of the said assessment, and containing the number of said policy, the period over which the assessment extended the amount of such assessment, and the time when and place where payable, was mailed to the plaintiff on the said 24th December, addressed to him at Brantford, his post office as given at the time of insurance being effected; and the plaintiff did not within thirty days after said 24th December, pay the said assessment, or any part thereof, nor did the plaintiff before the said fire or occurring of the loss in the declaration mentioned, pay the same, and the same remained

due and wholly unpaid at the time of said fire and alleged loss, by reason whereof the plaintiff became disentitled to recover the amount of his alleged loss or damage, and the board of directors of said company did not in their discretion decide otherwise, whereby, and by reason of the premises, the defendants say that the said policy became, and was, and is null and void as respects the said claim of the plaintiff.

Second replication to the second plea : that the defendants after the declaration by them of the assessment in the said plea mentioned, did on or about the 1st August, 1876, declare a further assessment upon the plaintiff's said undertaking of \$13.34, said assessment being for the period extending from the 18th February, 1876, to the 18th February, 1877, of which assessment the said defendants, on the 21st September last, gave the plaintiff notice, and the plaintiff thereupon paid to the said defendants the sum of \$27.88, being in full of the said two assessments so declared upon his said undertaking, and for interest upon the first of said assessments, from the date when the same became payable, and the defendants accepted such payment, so made as aforesaid. And the plaintiff says that the defendants thereby waived all right of forfeiture incurred by said plaintiff by reason of the non-payment within thirty days of the assessment in the said plea mentioned.

To this replication defendants demurred, on the grounds : That the said replication is no answer to the plea to which it is pleaded : that it admits the facts alleged in the second plea, and sets up no facts by which the same are avoided : that it does not shew that the alleged payment was made before the destruction of the insured property by fire, and the mere acceptance of such payment by the defendants after the fire would not of itself operate as a waiver of the forfeiture : that it is not alleged that the board of directors in their discretion decided to waive the forfeiture, or that the plaintiff should be enabled to recover, notwithstanding his default, as alleged in the said plea : that it does not shew or allege that the said second assessment was paid within thirty days after notice of said assessment was mailed to or received by the plaintiff.

April 27th, 1877. *Hardy*, Q. C., for the defendants. The replication is bad. There is nothing to shew when the fire took place, and that the action was commenced after the lapse of thirty days. Moreover to make the payment of the prior assessment good, it should have been alleged to have been made before the fire. The non-payment of the first assessment avoided the policy, and there is nothing shewn to constitute a waiver, or preclude defendants from setting up the previous forfeiture: 36 Vic. ch. 44; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69.

*Osler*, contra. The declaration shews that the writ issued on the 28th February, 1877, which was the commencement of the action; and it must be assumed that the action was not brought until after the fire and the lapse of thirty days. The receipt of the previous assessment clearly amounted to a waiver of defendants' previous right of forfeiture, or estops them from now setting it up, and it makes no difference whether it is before or after the fire: *Smith v. Mutual Ins. Co. of Clinton (a)*; *McCrea v. Waterloo Mutual Ins. Co.*, 26 C. P. 431.

May 1st, 1877. HAGARTY, C. J.—This action was commenced on the 28th February, 1877. The insurance was for three years, expiring 18th February, 1877. It is not stated when the fire took place. We may assume it was at least 30 days before issue of the writ.

The defence is, that an assessment of \$13.34 was made on plaintiff's premium note, on the 24th December, 1875, payable in 30 days: that the plaintiff was notified, but did not pay the same within the time, or before the fire; and the plaintiff became disentitled to recover, and the directors in their discretion did not decide otherwise, whereby the policy became void.

The replication sets out that on 1st August, 1876, defendants directed a further assessment of \$13.34 on plaintiff's note for the period from 18th July, 1876 to 18th February,

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(a) Ante p. 441.

1877, and notified the plaintiff thereof, on 21st September, 1877, and the plaintiff thereupon paid to the defendants \$27.88, being in full of said two assessments, and interest on the first assessment from the date when it was payable; and the defendants accepted such payment and thereby waived all right of forfeiture, &c.

The period covered by the second assessment extended beyond the occurrence of the fire. The plaintiff was in default from 24th January, 1876, and the company could have forfeited his policy. But over six months afterwards they treat his policy as subsisting by calling on him to pay a further assessment from February, 1876 to February, 1877, which he paid before any default, and included therein the first assessment, and defendants accepted both payments.

It is urged that the replication does not state that this was paid before the fire.

I do not think the objection should prevail.

The question is whether, whenever the loss happened, the policy was or was not an existing risk. If the defendants accepted the payments as alleged, whether before or after the fire, I do not see how they can be allowed to fall back on an alleged prior forfeiture in January, 1876. They treat the plaintiff as insured with them, when they called on him to pay for a period long after his alleged default.

I think the decision of *Smith v. Mutual Ins. Co. of Clinton*, lately decided in this Court (a), governs this case.

The only distinction is, that in the case cited the payment of the further assessment was made and received before the loss.

The judgment will therefore be for the plaintiff.

*Judgment for plaintiff.*

## WANDBY V. HEWITT.

*Sale of invention to be patented—Materiality of name—Agreement.*

A declaration set out an agreement, which, after reciting that the plaintiff had made an invention called "The New Dominion Stove-pipe Collar," and the agreement of the parties for the sale and purchase thereof, it was witnessed that plaintiff agreed to sell and defendant to purchase the right to use and sell, &c., the said article known as the above, in consideration of a specified sum to be paid after the issue of the patent therefor. The declaration then averred that the patent had issued for the invention referred to in the agreement and covering the article there described, though it was described in the patent as "Wandby's Improved Stove-pipe Collar," and that all conditions had been fulfilled &c., yet the defendant had not paid, &c.

Plea: that when the agreement was made both parties contemplated that the invention should be called "The New Dominion Stove-pipe Collar" and should be so described in the letters patent, with the object, amongst others, of distinguishing it from another similar but less valuable invention theretofore manufactured and sold by the plaintiff under the name of "Wandby's Improved Stove-pipe Stone"; and that the change of name was made by the plaintiff without defendant's knowledge or consent.

*Held*, plea good, for that the name of the invention was a material part of the contract.

DECLARATION: For that heretofore, and before the commencement of this suit, to wit, on the 7th of December, 1876, it was agreed by and between the plaintiff and defendant in the words and figures following, that is to say:

"This agreement, made this 7th of December, A.D. 1876, between Henry Wandby, of the village of Yorkville, in the county of York, of the first part, and Joseph Richardson Hewitt, of the city of Toronto, in the said county, clerk, of the second part,—

"Whereas, the party of the first part has invented a certain invention, called the 'New Dominion Stove Pipe Collar,' for which he is at the present time applying for a patent.

"And whereas the party of the second part has agreed to purchase from the said party of the first part the sole right to manufacture and sell the said article, known as the 'New Dominion Stove Pipe Collar,' in the city of Toronto, and also the right to sell within sixty miles of the said city, at or for the price of \$300, which said sum is to be paid after the patent for the said invention is duly issued and granted to the party of the first part, and after a due good assignment of the right to manufacture and sell as aforesaid shall be executed by the party of the first part to the party of the second part.

"Now this agreement witnesseth that the said party of the first part agrees to sell, and the party of the second part agrees to purchase from the said party of the first part the sole and exclusive right to manufacture and sell the said invention, called or known as the 'New Dominion Stove Pipe Collar,' for or within the city of Toronto, and also the right to sell the said invention within sixty miles of the said city, such last mentioned right to sell not however to be exclusive, at and for the price of \$300, payable \$50 on the date hereof, and the balance after the party of the first part shall have duly procured a patent for the said invention, and assigned or granted to the party of the second part the right to manufacture and sell as aforesaid, such right to be for five years from the date of issue of the patent.

"The party of the first part also agrees to furnish the party of the second part with all moulds and patterns, instructions, &c., necessary to carry on the manufacture of the said invention, and also to manufacture for him (the party of the second part) 100 of such collars, the materials for which are to be furnished and supplied by the party of the second part.

"Provided always, that if no patent shall be issued for the said invention to the party of the first part from any cause whatever, then the party of the first part shall refund on demand to the said party of the second part the said \$50 paid at the date hereof.

"In witness whereof," &c.

That the plaintiff, after the date of the said agreement, and after the same was entered into, duly procured the issue to himself on the 12th February, 1877, of letters patent of the Dominion of Canada for the said invention referred to in the said agreement, and covering the said article described in the said agreement as the "New Dominion Stove Pipe Collar," as will appear by the said letters patent, and the specifications thereto annexed, although the said invention is described in the said letters patent under the name of "Wandby's Improved Stove Pipe Collar." And the plaintiff has always been and now is ready and willing, and hereby offers to assign to the defendant the right to manufacture and sell the said invention, and is willing and offers to do all other things by him to be performed, as provided in said agreement, and has executed and tendered to the de-

fendant such assignment in writing and under the hand and seal of the plaintiff.

And all conditions were fulfilled, &c., to entitle the plaintiff to be paid the said sum so agreed to be paid by the defendant for said right to manufacture and sell the said invention, yet the defendant has not paid the same, and has refused, and still refuses to carry out the said agreement.

Seventh plea: that at the time of the making of the said agreement it was contemplated by the plaintiff and the defendant, and it was also contemplated by the said agreement, that the said invention, which constituted the subject matter of the said agreement, should be called the "New Dominion Stove Pipe Collar," and that the said invention should be described by such name in the letters patent for the same, for which the plaintiff was then applying, with the object and design (amongst other things) of clearly distinguishing the said invention or article from a certain other similar but less valuable article or invention theretofore manufactured and sold by the plaintiff under the name of "Wanby's Improved Stove Pipe Stone." And the defendant avers that the plaintiff, after the making of the said agreement, and without the knowledge or consent of the defendant, and without consulting the defendant, changed and altered the name of the said invention, which was the subject matter of the said agreement, and called the name "Wandby's Improved Stove Pipe Collar," and procured the same to be so described in the letters patent in the plaintiff's declaration mentioned; and by reason of the premises the plaintiff is not entitled to the money sought to be recovered.

To this plea the plaintiff demurred, on the grounds, that the true construction of the agreement, set out in the declaration, shews that the name of the invention was not considered material, and parol evidence of what was in contemplation of parties cannot be admitted: that it is not alleged that there was any fraud on the part of the plaintiff, and an innocent change of name would not form any sufficient answer to this action: that it is not alleged that the plaintiff represented that the invention should be called by the

name of "The New Dominion Stove Pipe Collar," or that defendant was induced to enter into the contract by reason of any representations made by the plaintiff as to the name of invention : that said plea does not allege that the name was a material part of the contract, nor that the calling of the invention by a particular name was any inducement to defendant to enter into the contract : that it is not shewn that the change of name was or is likely to be injurious to defendant, or that he has been in any way prejudiced.

The defendant joined in demurrer and took the following exceptions to the declaration.

1. That the agreement, set out in the declaration, shews that the plaintiff was to procure a patent for an invention called or known as the New Dominion Stove Pipe Collar, and that he should assign or grant to the defendant the rights to sell and manufacture the said invention, called or known as the New Dominion Stove Pipe Collar, as in the said agreement mentioned : that the said count shews that the plaintiff did not before action procure a patent for an invention called or known as the New Dominion Stove Pipe Collar, but that he procured a patent for an invention called or known as "Wandby's Improved Stove Pipe Collar," and sought to force the same upon the defendant, instead of that which the defendant had bargained for, and that the plaintiff, as appears by the said declaration, has not so performed his part of the said agreement as to entitle him to payment of the moneys sought to be recovered under the said first count.

2. That the true construction of the said agreement shews, that it was intended by the plaintiff and the defendant, that the said invention should be called and known as the New Dominion Stove Pipe Collar, and that the same should be so described in the letters patent, for which the plaintiff was then applying, and there is nothing in the said agreement, or in the said declaration, to shew that the name of the invention did not constitute a material part of the said agreement, or that it was not an inducement to the defendant to enter into the said agreement, nor is there anything in the said count to shew that the defendant in any

way assented to or sanctioned the change of name by the plaintiff, after the making of the said agreement, as set out in the said declaration; and the said count shews that the plaintiff has not performed his part of the agreement, so as to entitle him to payment of the moneys sought to be recovered.

April 27th, 1877. *Ritchie*, for the plaintiff. The material part of the contract was, the article itself, and not its name. The use of the name is merely to designate something that the plaintiff was selling, and which he agreed to have patented. The defendant has got what he bargained for. He should have alleged that there was fraud and misrepresentation.

*McMichael*, Q.C., contra. The agreement for sale was for a specific article, known and designated under a particular name, and that the patent was to be obtained for the article known as such. The name or title of the invention was clearly a material part of the contract: *Hindmarch* on Patents, 46, 159-60; *Rex v. Wheeler*, 2 B. & Al. 345.

May 1st, 1877. HAGARTY, C. J.—On the argument it was stated by counsel that there was no direct authority to guide us.

There is a large amount of authority as to the “title,” and also the specifications in ordinary patent cases.

It is urged by the plaintiff that so long as the invention for which the patent was obtained is the same invention which the parties agreed to sell and buy, the name is of no moment.

The term “title” is defined in the books thus: “The title of a patent discloses the object of the invention”: *Higgins’s Digest of Patent Cases*, 148 *et seq.*, collecting the authorities. The title and the specifications are to be read together.

Our Patent Act of 1872, 35 Vic. ch. 26, sec. 13, enacts that the applicant in his petition for patent shall insert “the title or name of the invention.”

Section 16. Every patent granted under this Act shall contain the “title or name of the invention, with a refer-

ence to the specification, and shall grant \* \* the exclusive right \* \* of making, constructing, using, and vending to others to be used the said invention."

In using these words as to title and name, it differs from the Consol. Stat. C., ch. 34.

The words "title or name" would apparently mean a concise description of the object of the invention, as in *Rex v. Wheeler*, 2 B. & Al. 345 at p 351, "A new and improved method of drying and preparing malt"; or, "A new and improved method for the purifying of gas," &c. From such a title information would be conveyed as to the nature of the invention.

On the face of this record we know nothing of the invention contracted to be sold and purchased, except that it is an invention called and known as "The New Dominion Stove Pipe Collar." It is not stated that it is an invention of a new, or improved method of making, or of cleaning stove pipes, or of making collars therefor, or what may be meant by a stove pipe collar. It is a contract merely for a named article, of which the quality or nature is unexplained.

The agreement states that the plaintiff "has invented an invention, called 'The New Dominion Stove Pipe Collar,' and that defendant has agreed to purchase the right to use and sell, &c., the said article, *known as* 'The New Dominion Stove Pipe Collar,' for money to be paid after the patent for said invention is issued." Then the right is granted on the one part and purchased, on the other, to sell the invention known as, "The New Dominion Stove Pipe Collar.

Then the plaintiff avers that the patent has issued, for the invention referred to in the agreement, and covering the article described therein, as "The New Dominion Stove Pipe Collar," although it is described in the patent as, "Wandby's Improved Stove Pipe Stove Collar."

The defendant objects that this change was made by the plaintiff, without consulting him, and without his knowledge or consent, and that when the agreement was made, both parties contemplated that the invention should be called

“The New Dominion Stove Pipe Collar,” and should be described by that name in the letters patent, with the object, amongst other things, of clearly distinguishing it from another similar but less valuable invention, heretofore manufactured and sold by plaintiff under the name of “Wandby’s Improved Stove Pipe Stone.”

On the best consideration I can give the case, I have arrived at the conclusion that this plea, if unanswered, is a good defence. The name may be a matter of vital importance to the successful sale of the article.

I cannot accede to the argument, that, so long as the invention is really the same, the name is unimportant. Why should the plaintiff be allowed to make a total change in the name without his vendee’s assent, and yet hold the latter to his contract?

The defendant agreed to purchase for sale and use an article to be called by the chosen and agreed on name. Has he also agreed to purchase it, when called and known by a totally different and possibly objectionable name?

If, as the plea asserts, an inferior article was before the public, known as “Wandby’s Improved Stove Pipe Stone,” should the defendant be held bound to take an article designed for the same general purpose, with a name so dangerously similar as “Wandby’s Improved Stove Pipe Collar?”

If the former article had obtained a bad repute in the trade, or in the eyes of the public, the effect on the sale of an article, with a name almost the same, might be most disastrous.

The agreement speaks of the invention, for which patent was being sought, as being *known* under the proposed name. This may well have been the case, as a patent may be granted for an invention in public use or for sale for any period not over a year before the application.

This name may have become well known and popular in the trade, and on the faith thereof the bargain may have been made.

A popular name is a thing of no small moment in deciding such a bargain.

If the plaintiff's argument prevail, a name of this popularity may, at his caprice, and against his vendee's assent, be changed into a most unpopular name to the most serious prejudice of the sale.

I see no reason why the defendant should be forced to take and pay for anything except that for which he bargained, and I am of opinion that on this record the change of name must be considered a matter of substance.

See *Webster* on Letters Patent for Inventions, 333, 678; *Hindmarch* on Patents, 46, 159, 160; *Godson's*, Law of Patents, Supp. 15.

The judgment will therefore be for the defendant on demurrer.

*Judgment for defendant.*

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## ROBERTSON V. WATSON.

*Deed—Top of the bank—Possession—Evidence.*

A deed of certain land described it as the east portion of lots 1 and 2 on the north side of the Grand River, and one of the metes and bounds was, "to where a post has been planted at the top of the bank of the Grand River (but no post appeared to have been planted); thence along the top of the bank of the Grand River," &c. By a clause in the deed the grantee was allowed the use of whatever water he might require from the Grand River opposite the said land for any works then or to be erected on the said land, so as in such use nothing was done to impede or injure the owners or occupiers of certain mill property in the full enjoyment of the water power appertaining thereto, &c. And in an agreement previously entered into, and in pursuance of which the deed was executed, there was a clause to the same effect. It appeared that the top of the bank was not now discernible, having been cut away by the defendant. There was contradictory evidence as to twenty years' possession by defendant, and the learned Judge at the trial found there was none.

*Held*, on appeal, reversing the judgment of the Common Pleas, DRAPER, C. J. OF APPEAL, and GALT, J., dissenting. 1. That the deed only conveyed the land to the top of the bank, and not *ad medium filum aquæ*, the clause in the deed and agreement supporting such a construction. 2. That the finding of the learned Judge on the question of possession should not be interfered with.

THIS was an action of ejectment to recover possession of certain land and land covered with water situate in the village of Fergus, in the township of Nichol, which was described as follows: "Commencing on the top of the northwesterly bank of the Grand River, on the north side of St. David street, at the southeast angle of the southeast part of lot No. 1, conveyed to Thomas Watson, along with the southeast part of lot No. 2, on the 30th day of October, A.D., 1851, by the Hon. John Hillyard Cameron; thence along the said top of said bank from said southeast angle of said lot No. 1, three chains and eighty links, more or less, to the northeast angle of said lot No. 2, so conveyed by said Cameron; thence southeast 45°, one chain and eighteen links, more or less, to the centre of the said river; thence up the centre of the said river eight chains and sixty-eight links, more or less, to the intersection with the north limit of the lots shewn on the registered plan of the said village of Fergus, as 'Hon. Adam Ferguson,' when said line is produced; thence

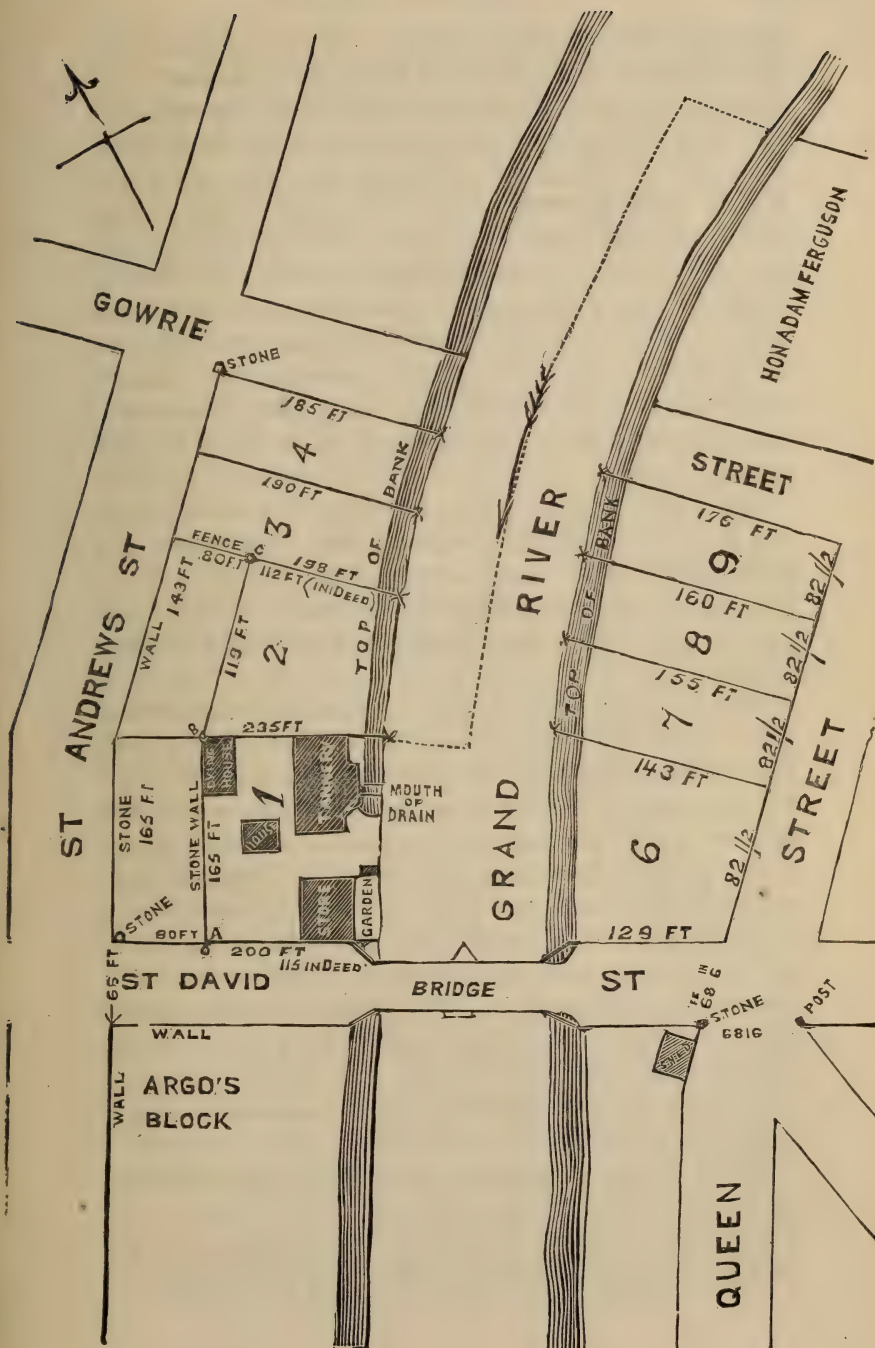
southeast  $45^{\circ}$ , one chain and twenty five links, more or less, to a stone monument, indicating the northeast angle of said lot marked 'Hon. Adam Ferguson,' as aforesaid; thence southwesterly along the west limit of said lot designated Hon. Adam Ferguson as aforesaid, and across Gowrie street, five chains and seventy-three links, more or less, to the north angle of lot No. 9; thence continuing along the north-west limits (be the same land or water) of lots 9, 8, 7, and 6, five chains and fifty-seven links, more or less, to the north-west angle of lot 6, at St. David's street; thence along the north side of St. David's street, across the Grand River, to the point of commencement, embracing one acre more or less." (See Plan on opposite page.)

The plaintiff claimed title by virtue of a deed to him, dated 12th October, 1871, from one Schreiber, which said Schreiber claimed under a deed from the Hon. J. H. Cameron to him, dated 16th October, 1857; and Cameron claimed under a deed from James Webster, dated 1st September, 1851.

The defendant claimed title under a deed to him from the Hon. J. H. Cameron, dated 30th October, 1851; and limited his defence to the land described as follows:— "Commencing at a point in the division line between lots Nos. 2 and 3, 192 feet from St. Andrew's street; thence south  $40^{\circ} 40'$  east, along the said limit, eighteen feet; thence south-westerly 285 feet, more or less, to a point in the southerly limit of St. David's street, 212 feet distant from St. Andrew's street aforesaid; thence north  $60^{\circ} 70'$  west, along St. David's street aforesaid, 15 feet; thence north  $29^{\circ} 70'$  east, 165 feet, to the limit between lots 1 and 2; thence north-easterly 119 feet, more or less, to the place of beginning, which last mentioned piece he also claimed by length of possession.

The cause was tried before Morrison, J., without a jury, at Guelph, at the Fall Assizes of 1872.

It appeared that Mr. James Webster, being seized of a considerable tract of land in the township of Nichol, in the



year 1846, had a portion surveyed into town lots, to constitute part of the village, now the town, of Fergus. The lands so surveyed, excepting certain pieces specially excepted, Mr. Webster conveyed in fee to the Hon. J. H. Cameron, by deed dated 1st September, 1851. The lots Nos. 1 and 2, Mr. Cameron conveyed to the defendant by deed dated 30th October, 1851, by the following description, that is to say: "All and singular those certain parcels or tracts of land and premises, situate, lying and being in the village of Fergus, in the county of Wellington and Province of Canada, containing by admeasurement 32,296 square feet, be the same more or less, being composed of the southeast portions of lots 1 and 2, on the northwest side of the Grand river, and east of Tower street, and particularly described as follows: Commencing on the east side of St. David street, eighty feet from where a post has been planted at the intersection of St. Andrew and St. David street: thence north  $29^{\circ}$ ,  $30'$  east, 165 feet, more or less, to the division line between lots 1 and 2; thence north  $45^{\circ}$ , east, 119 feet, more or less, to where a post has been planted on the division line between lots 2 and 3, 80 feet more or less from the north side of St. Andrew street; thence along said division line between lots 2 and 3, south  $40^{\circ}$ ,  $40'$  east, 112 feet more or less, to where a post has been planted at the top of the bank of the Grand river; thence along the top of the said bank of the Grand River to the line forming the east side of St. David street; thence north  $60^{\circ}$ ,  $30'$  west, along said east side of St. David street, 115 feet, to the place of beginning." The deed then proceeded: "Together with \* \* all ways, waters, water courses, easements, privileges, profits, hereditaments, and appurtenances whatsoever, to the said parcel or tract of land, tenements, hereditaments, and premises belonging or in anywise appertaining, or therewith used and enjoyed, or known, or taken, as part or parcel thereof, or as belonging thereto, or to any part thereof," &c., "To have and to hold the same lands, tenements, and hereditaments, and all and singular other the premises hereby conveyed, or

mentioned, or intended so to be, with their and every of their appurtenances, unto the said" the defendant, "his heirs and assigns, to his and their sole and only use forever."

The deed also contained the following provision: "And the said party of the first part," the said J. H. Cameron, "allows to the said party of the third part," the said Watson, "his heirs and assigns, the use of whatever water he or they may require from the Grand river, opposite the said parcel or tract of land, for any works now erected or to be erected on the said land, so as in such use nothing is done to impede or injure the owners or occupiers of the Fergus Mills or Distillery property in the full enjoyment of the water power appertaining thereto, and so as the party of the first part grants only to the party of the third part such use of the said water as he may be entitled to grant and no further or other use whatever."

By an agreement previously entered into between the said Webster and the defendant, and drawn up by the defendant's brother, for the purchase of the last described lands, after reciting the agreement to sell the said lands it was further agreed that the defendant was to occupy the said lands for a tannery or any such works as he might think proper to erect thereon, and that for the necessary supply or use of water for his works, he, his representatives, or assigns, was or were entitled to draw or use the same from or in the Grand River, opposite said parcel or tract of land, provided always in so doing, that he the said defendant, his representatives or assigns, do nothing to impede or injure the owners or occupiers of the Fergus mills or distillery property in the full enjoyment of the water power appertaining thereto"; and further, that the defendant was to enclose the said parcel or tract of land with a good and sufficient stone or board fence on the north-east and north-west sides thereof, within one month from the date thereof, otherwise the said Webster should have power to enter on the said premises and enclose the same at the expense of the said defendant.

It appeared that the top of the bank was not now discernible, having been cut away by the defendant.

Evidence was given on the part of the defendant in proof of twenty years' possession by him, and as a part of such proof that he had in 1851, and within the month required by the agreement, carried down the fence on the line of St. David's street to the water's edge. Evidence was, however, given on the part of the plaintiff contradicting this.

For the defendant it was objected that the plaintiff must fail: that the description of the south-east portion of the lots included all to the water's edge: that it was not shewn where the top of the bank was; and also that the defendant's deed contained a reservation or stipulation of the defendant's right to go to the water in order to use the river: that the defendant had proved twenty years' possession.

For the plaintiff it was contended that the top of the bank was not the edge of the river: that lots 1 and 2 were sold before the registered plan, and were not on it as sold: that the measurements were absolute and governed: that according to the original plan the defendant claimed a piece not within his deed, and as a matter of law the plaintiff was entitled to recover: that the reservation in the defendant's deed shewed conclusively that the defendant was not entitled to go to the edge of the river; and that the evidence as to possession had failed.

The learned Judge found as follows: "I find for the plaintiff on the question of twenty years' possession. I find generally for the plaintiff on the paper title, that he is entitled to recover some portion of the land in dispute; and I reserve leave to the defendant to move to enter a verdict for him should the Court be of opinion, from the description contained in the deed, that the defendant's deed covers the whole of the land in dispute." And he accordingly entered a verdict for the plaintiff.

In Michaelmas term, November 21st, 1872, *M. C. Cameron*, Q. C., obtained a rule *nisi* under the Law Reform Act to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant.

In Easter term, May 26, 1873, *J. H. Cameron*, Q.C., and *S. Richards*, Q. C., shewed cause.

*M. C. Cameron*, Q. C., contra.

June 28, 1873. GWYNNE, J., delivered the judgment of the Court.

This is an action of ejectment brought to recover possession of a narrow strip of land, or land covered with water, which the plaintiff claims to lie between the south-east boundary of lots one and two, and the corner of St. Andrew and St. David streets, in the Town of Fergus, and the middle thread of the Grand River there.

The plaintiff claims title in virtue of a deed to him, dated the 12th October, 1871, from one Schreiber, which said Schreiber claimed under a deed from the Hon. J. H. Cameron to him, dated the 16th October, 1857, and Cameron claimed under a deed to him from James Webster, dated the 1st day of September, 1851.

The defendant claimed the piece in dispute as part of and appurtenant to the said lots one and two, conveyed to him in fee by deed from above-named J. H. Cameron, dated 30th October, 1851, and by length of possession.

Sitting as jurors, as we are obliged to do in this case, which was tried without a jury, and drawing all proper and necessary inferences as a jury should, we can come to no other conclusion than that the defendant is entitled to prevail, both in respect of his paper title and of the twenty years' possession set up by him.

By some mistake it would seem that when Mr. Cameron conveyed to Mr. Schreiber by deed dated the 16th October, 1857, he inserted the precise description contained in the deed from Webster to him, and omitted to exclude the piece of land conveyed to the defendant by the deed of 30th October, 1851. No one appears to have ever claimed that there was a strip of land lying between the lots 1 and 2 and the Grand River, until the execution of the deed from Schreiber to the plaintiff, dated 12th October, 1871, under which the plaintiff now claims; and the first question is, simply, was there and is there any such strip.

It is to be observed that the lots one and two mentioned in the deed from Cameron to the defendant are described not as situate on any street, although they abut on St. Andrew street, and number one also on St. David street, but they are described as lots numbers one and two, *on the north-west side of the Grand River*. *Primâ facie* these words indicate that the lots abut on the Grand River on its north-west side. Moreover, what is expressly conveyed is the south-eastern portions of these lots, so that if the south-easterly boundary of the lots can be ascertained there is no longer any doubt where the south-easterly boundary of the land conveyed to the defendant is. Then when we come to the course in the description by metes and bounds, which starts from a point in the boundary line between lots two and three, distant eighty feet from the south limit of St. Andrew street, in the direction of the river, we find it described one hundred and twelve feet, *more or less*, to where a post has been planted at *the top of the bank of the Grand River*—where, however, no post appears to have ever been planted; and the next course is stated to be “*along the top of the said bank of the Grand River to the line forming the east side of St. David street.*”

Now these words, “the top of the bank of the Grand River,” are abundantly sufficient to convey and will convey to the waters of the river and *ad medium filum aquæ*, unless there be some words forming part of the description, or introduced by way of exception, which *clearly exclude* whatever may lie between the bank and the *medium filum aquæ*.

For this position it is sufficient merely to quote *Kains v. Turville*, 32 U. C. R. 17, and *Parker v. Elliott*, 1 C. P. 470, and the onus lies upon the plaintiff, who asserts that there is such a strip, to shew its existence, and that it is excluded from the deed to the defendant.

The question then is: Does the defendant's deed shew that there is such a strip, and that it is excluded from the grant to him.

The grant to the defendant, after describing the piece of land conveyed as above, proceeds: “Together with \* \*

all ways, waters, water-courses, easements, privileges, profits, hereditaments and appurtenances whatsoever, to the said parcel or tract of land, tenements, hereditaments and premises belonging or in any wise appertaining, or therewith used and enjoyed, or known or taken as a part or parcel thereof, or as belonging thereto, or to any part thereof," &c. "To have and to hold the same lands, tenements and hereditaments, and all and singular other the premises hereby conveyed or mentioned, or intended so to be, with their and every of their appurtenances, unto the said" (the defendant,) "his heirs and assigns, to his and their sole and only use for ever."

There is nothing then whatever, either in the description of the premises conveyed or in the habendum, to qualify in any manner the grant *ad medium filum aquæ*.

But it is contended that there is a clause added at the end of the deed, which conclusively establishes that there is the strip contended for between the bank and *medium filum aquæ*, which has not passed by the deed. The previous terms of the deed being sufficient to go *ad medium filum aquæ*, it is necessary for the plaintiff to establish that the additional clause upon which he relies is utterly inconsistent with the fact that the deed should convey the soil *ad medium filum aquæ*.

The clause relied on is: "And the said party of the first part allows to the said party of the third part, his heirs and assigns, the use of whatever water he or they may require from the Grand River, opposite the said parcel or tract of land, for any works now erected or to be erected on the said land, so as in such use nothing is done to impede or injure the owners or occupiers of the Fergus Mills or distillery property, in the full enjoyment of the water power appertaining thereto, and so as the party of the first part grants only to the said party of the third part such use of the said water as he may be entitled to grant, and no further or other use whatever."

The argument is, that this clause conclusively shews that there is a strip between the lots and the river, which is

excluded from the grant, upon the allegation that if there were not this clause would be insensible.

But it seems to us that the object of this clause, as its terms shew, was to secure the grantees of the mill and distillery lots in the full enjoyment merely of a certain water-power rendered already appurtenant thereto, or intended so to be, and that for such purpose it was of no importance in whom the fee of the soil of the river, or of any land, if any, between the bank and the river, was vested. The preservation of the water-power attached to the mill and distillery, for the benefit of the occupiers thereof, is quite consistent with the grant to the defendant of lots 1 and 2, and *ad medium filum aquæ*.

This clause seems to us to be quite consistent with an intention merely to restrict the defendant from *using* the waters of the river, and from asserting his privilege as a riparian proprietor to the prejudice of the owners or occupiers of the mill and distillery lots, or to the prejudice of the water-power rendered appurtenant thereto or intended so to be. However, for the present purpose, it is sufficient to say that the clause fails to establish, in our judgment, such a conclusive intention of reserving from the grant that conveyance of the soil *ad medium filum aquæ*, which the residue of the deed is abundantly sufficient to effect.

Then an agreement, dated the 27th of April, 1851, is produced by the plaintiff, which contains an agreement by Mr. Webster to convey to the defendant the land for which the deed of the 30th October, 1851, was afterwards executed by Mr. Cameron, and it is contended that this agreement shews in like manner that the description, *to the top of the bank*, was intended to exclude the strip, contended for by the plaintiff, between the bank and the *medium filum aquæ*.

We are of opinion that if the deed of the 30th October, 1851, does not include the strip, this agreement cannot have that effect. However, we are of opinion that the terms of the agreement, which are relied upon, are capable of the same interpretation as that which we have given to

the clause inserted in the deed plainly in reference to this agreement. It is worthy of observation that in fact no post appears to have been ever planted at "the top of the bank of the Grand River, on the line between lots 2 and 3."

The agreement appears to have been drawn, not by a professional man, but by a mercantile man, namely, the defendant's brother. The words in the agreement, which are relied upon, are as follows:—"It is further agreed between the parties to these presents, that the said Thomas Watson is to occupy in part the above described parcel of ground for a tannery, or any such works as he may think proper to erect thereon, and that for the necessary supply or use of water for his works he, his representatives or assigns, is or are entitled to draw or use the same from or in the Grand River opposite the said parcel or tract of land, *provided always* in so doing that he, the said Thomas Watson, his representatives or assigns, *do nothing to impede or injure* the owners or occupiers of the Fergus mills or distillery property in the full enjoyment of the water-power appertaining thereto."

Here we see that it was contemplated that the defendant was to erect a tannery and other works which would require a large supply of water, the use of which might possibly impede or injure the occupiers of the mills or distillery in the full enjoyment of the water-power already rendered appurtenant thereto or intended so to be; and we think that this provision in the agreement, that the defendant Watson shall not use the waters of the river for his purposes to the prejudice of the mills and distillery, is quite consistent with the term "top of the bank" having and obtaining its *primâ facie* force and effect of including *ad medium filum aquæ*, and with the grant and conveyance to Watson of the soil and land *ad medium filum aquæ*.

But then it appears that these lots, Nos. 1 and 2 on the north-west side of the Grand River, have only an existence and situs by such designation in pursuance of a survey made in 1846 and a plan of such survey made for regis-

tration, but which although made was not registered until May, 1854. It was registered on the 25th May, 1854, and is on its face called "Plan of Part of Fergus," and on it is written, "Survey made 1846, plan registered 25th May, 1854."

It is shewn in evidence to have been the plan made upon and in pursuance of the original survey made for Mr. Webster in 1846, and being such it can be looked at for the purpose of determining where the boundaries of the lots one and two, on the north-west side of the Grand River, in the village of Fergus are; and thereby it is plainly laid down that the lots extend to the waters of the river. This plan, therefore, accords with the deed which describes the pieces of land conveyed to the defendant as the south-east portions of lots one and two on the north-east side of the Grand River, shewing the south-east boundary to be the river.

We think this evidence much more satisfactory to rely upon than the oral testimony of the surveyor who made the survey in 1846, and who, in pursuance thereof, made the plan for registration, and who now seeks to establish in effect that his plan is wrong.

The proper conclusion, we think, to arrive at is, that the deed under which defendant claims is, in its description and terms, sufficient to grant *ad medium filum aquæ*, and that the plaintiff has failed to establish that there is any such strip as he contends for, not granted to the defendant by the deed of 30th October, 1851.

We also come to the conclusion that the defendant has been in the undisputed enjoyment up to the waters of the river, and so constructively *ad medium filum aquæ*, for more than twenty years before action brought, and, as we have already said, in virtue of his agreement with Mr. Webster, in April, 1851.

We think too much stress was laid at the trial upon the inquiry whether or not the fence on the line of St. David street was carried down by the defendant in 1851 to the river. We think the weight of evidence is that it was. It

may be perhaps that the elevation of the bridge there rendered it unnecessary, but there is no doubt that the fence was constructed along the line of lots two and three to the river in 1851, shortly after the execution of the agreement; and we think the fair conclusion is, that it was so constructed within the month mentioned in that agreement.

We find also, as matter of fact, that almost from the execution of that agreement the defendant excavated below what the surveyor, called by the plaintiff, calls the *bank* of the river, which however we admit is nowhere now discernible, and that he has continuously since treated the land as his own, in fact, as the surveyor says, effacing the bank so that it cannot be discovered.

We find also that Mr. Webster was aware of this conduct of the defendant, and we find that no one, for a period of upward of twenty years from the execution of the agreement of 27th April, 1851, except the defendant, had any possession up to the water's edge at these lots one and two. The only inference from the evidence which, as we think, can be properly drawn, is, that the defendant had possession up to the river ever since he first entered, in April, 1851, whether the fence on St. David street was or not then carried down to the water's edge, although, as we have said, we are of opinion that the proper conclusion to arrive at upon the evidence is, that it was.

The rule will be absolute to enter verdict and judgment for the defendant.

*Rule absolute.*

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From this judgment the plaintiff appealed.

The following were the plaintiff's reasons for appeal :—

The judgment of the Court of Common Pleas proceeds on the ground that the land to the middle of the stream passed to the defendant by the deed of the 30th October, 1851; and also on the ground of length of possession.

The plaintiff contends that said judgment should be reversed, and that the rule *nisi* should be discharged, for the following reasons :—

As to the effect of the deed :

1. That said lots Nos. 1 and 2, as originally laid out, came only to the top of the bank, and as the deed purports to convey only the south-east portions of said lots the special description cannot carry the land beyond the limits or boundary of the lots.

2. That the special description carries the land only “to the top of the bank” and thence “along the top of said bank” to the east side of St. David street, and is not sufficient to cover or pass the land to the middle of the stream, and does not include the strip in question in the suit.

3. That the special grant in the deed of the right to use the water is also inconsistent with defendant having acquired title to the middle of the stream, or having become riparian proprietor.

4. That the defendant established no right or title under said deed, or by the operation thereof, or otherwise, to the strip of land in question.

And as to the question of length of possession :—

1. That the verdict on that question, which was one of fact for the learned Judge acting as a jury, was found in favour of the plaintiff at the trial, and no leave was reserved to enter the verdict for the defendant on that ground of defence ; and as there was sufficient evidence to warrant the finding, such verdict should not have been set aside and entered for the defendant.

2. That the evidence or weight of evidence was in favour of the plaintiff on the question of length of possession, and he was entitled to a verdict thereon.

The following are the respondent's reasons against the appeal:

1. By the deed and agreement under which the respondent claimed the property in question his boundaries extended to the water's edge, and by operation of law to the middle of the river.

2. There was no evidence of posts having been planted at the top of the bank in the original survey, to mark the limit of lots Nos. 1 and 2, and the original plan shewed, according to the evidence of Mr. Schofield, the surveyor who laid out the lots, that the lots extended to the river. So the plan and deed must govern, there being no evidence of work on the ground to contradict them.

3. The judgment of the Court on the questions of fact and law is correct, and ought not to be reversed by reason of anything in the appellant's reasons alleged.

January 13 and 14, 1874 (a). *S. Richards*, for the appellant, cited *Clark v. Bonnycastle*, 3 O. S. 528; *Wigle v. Stewart*, 28 U. C. R. 427, 432, 436; *Iler v. Nolan*, 21 U. C. R. 309; *Ferrie v. Wright*, 20 U. C. R. 644; *Parker v. Elliott*, 1 C. P. 470; *Houck on Rivers*, secs. 5, 10; *Canal Appraisers v. People*, 17 Wend. 571, 599; *Simpson v. Dendy*, 8 C. B. N. S. 433; *Lord v. Commissioners of Sidney*, 12 Moore P. C. 473; *Berridge v. Ward*, 10 C. B. N. S. 400; *Bradford v. Cressey*, 45 Maine 9; *Dunlap v. Stetson*, 4 Mason 349; *Howard v. Ingersoll*, 13 Howard 381, 426; *Child v. Starr*, 4 Hill N. Y. 369, 5 Denio 599; *Halsey v. McCormick*, 3 Kernan N. Y. 296; *Angell on Watercourses*, 6th ed., p. 30, sec. 26; *Marquis of Salisbury v. Great Northern R. W. Co.*, 5 C. B. N. S. 174; *Jones v. Williams*, 2 M. & W. 326; *Doe dem. Barrett v. Kemp*, 2 Bing. N. C. 102; *Searby v. Tottenham R. W. Co.*, L. R. 5 Eq. 409.

*M. C. Cameron*, Q.C., for the respondent, cited *Jamieson v. McCollum*, 18 U. C. R. 445; *Re McDonough*, 30 U. C. R. 288; *Mulholland v. Conklin*, 22 C. P. 372; *Heyland v. Scott*, 19 C. P. 165; *Davis v. Henderson*, 29 U. C. R. 344; *Kains v. Turville*, 32 U. C. R. 17.

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(a) Present—DRAPER, C. J. of Appeal, RICHARDS, C. J., SPRAGGE, C., HAGARTY, C.J.C.P., GALT, J., STRONG, V.C., and BLAKE, V.C.

December 18th, 1874. DRAPER, C. J. of Appeal (*a*), stated that of the members of the Court before whom the cause was heard, six of them were now prepared to give judgment, but were equally divided, Strong, J. A., the other Judge before whom the case was argued, being unable through his appointment to the Court of Appeal, to take part in the judgment. The Court, at the request of the plaintiff, deferred giving judgment. Subsequently, the Act 38 Vic. ch. 10, O., was passed, by which Strong, J. A., was enabled to join in disposing of the case, and on the 18th June, 1875, judgment was delivered.

RICHARDS, C. J. (*b*)—It seems to be settled law, that when by the words of a grant a piece of land is bounded by a highway or by a creek or river (not navigable), a moiety of the highway, creek, or river passes.

The language of Chief Justice Erle in *Berridge v. Ward*, 10 C. B. N. S., 400, at p. 415, is, "Where a close is conveyed with a description by measurement and colour on a plan annexed to and forming part of the conveyance, and the close abuts on a highway, *and there* is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum*, passes by the conveyance."

In the same case Williams, J., said: "In the case of *Marquis of Salisbury v. Great Northern R. W. Co.*, 5 C. B. N. S. 174, which has been referred to, there was enough on the face of the conveyance, which was set out in the special case, to shew that a moiety of the adjoining road was not intended to pass. That case, therefore, is out of the general rule, which I take to be this—that a conveyance of a piece of land to which belongs a moiety of an adjoining highway, passes the moiety of the highway by the general description of the piece of land."

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(*a*) Present—DRAPER, C. J. of Appeal, RICHARDS, C. J., SPRAGGE, C., HAGARTY, C. J. C. P., GALT, J., and BLAKE, V. C.

(*b*) Present.—DRAPER, C. J. of Appeal, RICHARDS, C. J., SPRAGGE, C., STRONG, J. A., GALT, J., and BLAKE, V. C.

Many of the cases appear to establish that when the description is to the river and along the river, this would carry the land to the centre of the stream.

It seems that the question must always be, as to what was the intention of the parties, to be gathered from the grant.

In the case in the Privy Council, of *Lord v. Commissioners of Sidney*, 12 Moore P. C. 473, Sir J. Coleridge, in giving the judgment, said, at p. 496 : their Lordships were "clearly of opinion that upon the true construction of this grant" (one of the boundaries of the land was on the south by that small creek) "the creek, where it bounds the land is *ad medium filum*, included within it. In so holding they do not intend to differ from old authorities in respect to crown grants ; but upon a question of the meaning of words, the same rules of common sense and justice must apply, whether the subject matter of construction be a grant from the Crown or from a subject. It is always a *question of intention*, to be collected from the language used with reference to the surrounding circumstances.

\* \* If lands granted were described as bounded by a house, no one could suppose the house was included in the grant ; but if land granted were described as bounded by a highway, it would be equally absurd to suppose the grantor had reserved to himself the right to the soil *ad medium filum*, in the far greater majority of the cases wholly unprofitable."

The description here refers to the lots in question as being composed of the east portions of lots 1 and 2 on the north side of the Grand River. I do not think this implies or necessarily means that these lots touch or adjoin the Grand River. If it were so, it would equally shew that they adjoined Tower street, which they do not, for the description proceeds, and *east* of Tower street ; and it appears by the plan that they are more than 800 feet north-east of Tower street. The third course mentioned in the deed is ; "Thence *along* said *division line* between lots 2 and 3, south 40° 40' east, 112 feet, more or less, to

where a post has been planted on the top of the bank of the Grand River; thence along the top of *the said bank* of the Grand River to the line forming the east side of St. David street. The remaining course is: "Thence north  $60^{\circ} 30'$  west, along said east side of St. David street, 115 feet, to the place of beginning."

If the third course had simply been, then to the bank of the Grand River, or to the Grand River where a post has been planted, and thence along the river to St. David street, the authorities would well sustain the view that the deed (in the absence of anything else to shew a contrary intention), would carry the line to the centre of the stream, though the post might have been planted on the top of the bank; for in that case the post would apparently be planted to shew the course or direction of the line to the river, and might well be planted on the top of the bank to prevent its being carried away.

But here the intention is shewn not only by the course being given, but the degrees and minutes are named, and it is further stated to be along the division line between lots Nos. 2 and 3. The post then seems to be intended to have been placed there to limit the line in its direction to the river, and the physical object, the top of the bank, also shews where the post was to be planted.

The next course does not say, thence along the river, or the water's edge, to St. David street, but "along the top of the said bank of the Grand River to the line forming the east side of St. David street, and the description is finished: "thence north  $60^{\circ} 30'$  west along said east side of St. David street, 115 feet to the place of beginning."

I have not met with any case in which language like that contained in this deed has been held to carry the land described to the middle of the stream. No doubt the language used in some of the cases might lead to the conclusion that when the line runs to the bank of the river it would extend *ad medium filum*, but in the end it is a question of construction as to what the parties really meant by the language they used.

In ordinary language, when a grantor conveys land to the top of the bank of a river, and there is a well defined distinct bank, and nothing is said about the water, or the water's edge, or even the shore, and there are obvious reasons why the grantor should limit the grant so as not to interfere with the stream, I think we may well hold that this grant does not cover the land to the centre of the stream. When we look further on in the deed now before us, we find this language: "And the party of the first part allows to the said party of the third part," (the defendant) "his heirs and assigns, the use of whatever water he or they may require from the Grand River, opposite the said parcel or tract of land, for any works now erected or to be erected on the said land, so as in such use nothing is done to impede or injure the owners or occupiers of the Fergus mills or distillery property in the full enjoyment of the water power appertaining thereto, and so as the party of the first part grants only to the party of the third part such use of the said water as he may be entitled to grant and no further or other use whatever."

I think this language confirms the view I have already expressed as to the intention of the parties, that the grant should not carry the defendant's land to the middle of the stream.

If it had only been intended as a reservation to the grantors or owners of the mill of the right or easement to the use of the water for the mill and distillery, it would have been more easily and technically done by simply reserving or excepting out of the grant the right to use the water for the purpose of the mills, instead of the form of a license to defendant to use the water which he did not need, for if he owned the land to the middle of the stream, he would have that right as a riparian proprietor.

"The bank is the outermost part of the bed in which the river naturally flows at its fullest. \* \* This signifies that that space next to the bank, which is sometimes not occupied by the river, when reduced by heats in the summer season, is not a part of the bank. \* \* If at any time,

either from rains, the sea, or any other cause, it has overflowed for a time that line, it does not by such overflow change its banks. \* \* Overflowing does not alter the bank of a river; because that overflow is for a time only, while the natural flow is more or less constant": *Houck on Rivers*, p. 5, sec. 8, quoting from the Commentary of *Vinnius*.

I have made abstracts from a few American cases, not because I consider them as binding authorities on us, but as they are the views of able and distinguished lawyers, based on the English common law, and deciding these cases upon its principles, I think their opinion entitled to great respect.

In the first case I refer to the language of Judge Story, whose opinions are cited in all the English Courts with confidence and approbation.

In *Dunlap v. Stetson*, 4 Mason 349, p. 365, the description was "beginning at a stake on the west bank of Penobscot river, near a thorn bush \* \* thence south nine rods to a stake and stones on the same bank of the same river; thence running on the western bank of said river to high water mark, \* \* with all the privileges of water and landing to the same belonging."

Story, J., said, at p. 366, this "is not a deed bounding the grantee on the river, or the stream of the river, generally, \* \* but the boundaries are specific and definite \* \* The limitation throughout is by the bank of the river and with reference to known objects on that bank."

Curtis, J., in *Howard v. Ingersoll*, 13 Howard 381, at p. 428, says: "In all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows, wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water."

In *Child v. Starr*, 4 Hill N. Y. 369, Chancellor Walworth, an able and distinguished lawyer, refers to

several American cases, amongst them *Hatch v. Dwight*, 17 Mass. 289 at p. 298, where it was decided that where land was bounded by the bank of a stream, it necessarily excluded the stream itself. And in that case, Parker, C.J., said, the owner may undoubtedly sell the land without the privilege of the stream, "as he will do if he bounds his grant by the bank."

The learned Chancellor then proceeds, using this language, at p. 375: "Running to a monument standing on the bank, and from thence running *by the river or along the river*, &c., does not restrict the grant to the bank of the stream; for the monuments in such cases are only referred to as giving the directions of the lines *to the river*, and as not restricting the boundary *on the river*. If the grantor, however, after giving the line to the river, bounds his land by the *bank* of the river, or describes the line as running *along the bank* of the river, or bounds it upon the *margin* of the river, he shews that he does not consider the whole *alveus* of the stream a mere mathematical line, so as to carry his grant to the middle of the river."

In *Howard et al. v. Ingersoll*, 13 Howard 416, in the United States Supreme Court, Mr. Justice Wayne said: "If the language of the article had been, 'beginning on the western bank of the Chattahoochee, and running thence up the river,' and no more had been said, the middle thread of the river ordinarily, and without any reference to the fact that Georgia was the proprietor of the river, it would have been said to be the dividing line between the two States. But there is added, 'running up the said river Chattahoochee and along the western bank thereof.' \* \* \* "The words 'along the bank,' added to the words 'on the bank,' distinguish this case from all of those in which Courts have had the greatest difficulty where a line was to be fixed when it is on the bank *without a call* for the stream or along the river, or up or down the river: Angel 19. Along the bank, is strong and definite enough to exclude the idea that any part of the river or its bed was not to be within the State of Georgia. It controls any legal implication of a contrary character."

In the same case Mr. Justice Nelson, formerly Chief Justice of the State of New York, and a Judge of high legal attainments, uses the following language, at p. 421 : " But grants of land bounded on rivers above tide water, or where the tide does not ebb and flow, carry the grantee to the middle of the river, unless there are expressions in the terms of the grant, or something in the terms taken in connection with the situation and condition of the lands granted, that clearly indicate an intention to stop at the edge or margin of the river. There must be a reservation or restriction, express or necessarily implied, which controls the operation of the general presumption, and makes the particular grant an exception \* \* Where land adjoining a fresh water river, or above tide water, is described as bounded by a monument, whether natural or artificial, such as a tree or a stake standing on the bank, and a course is given as running from it up or down the river to another monument standing upon the bank, these words necessarily imply, as a general rule, that the line is to follow the river, according to its meanderings and turnings, and the grantee takes to the middle of the river. Such is the uniform construction given to this description where the common law prevails. It has been repeatedly applied to grants on the River Mississippi, the Missouri, the Hudson, the Connecticut, and other great rivers in the United States, above tide water : 3 *Kent's Com.*, 11th ed., secs. 427, 428, 429, and notes ; *Angell on Water Courses*, 6th ed., pp. 30, 31. Had the description in this case been limited to the first two calls in the grant, it would have been impossible to have taken it out of this rule of construction ; and the owners on the Alabama side would have been carried to the middle of the river. But the third call, which is 'along the western bank thereof,' limits the effect and operation of the other two, and excludes the bed of the river. It indicates an intent to reserve the river within the boundary and jurisdiction of Georgia, and to confine the grantee to the western edge or bank."

I refer to the judgment of Rice, J., in *Bradford v. Cressey*, 45 Maine 9, as putting the law of the case in a clear light, and arguing the points in an able manner.

He says, at p. 13: "It has been decided that the same principle applies to the construction of grants bounded generally upon highways, party walls, ditches, &c., as to fresh water streams. And it is undoubtedly true, that where a grant is bounded upon a non-navigable fresh water stream, a highway, a ditch, or party wall, or the like, such stream, way, ditch, or wall, are to be deemed monuments, located equally upon the land granted and the adjoining land, and in all such cases the grant extends to the centre of such monument.

"It is, however, competent for the grantor to limit his grant as he may choose. He may exclude or include the entire monument, and run his line on either side or to the centre thereof, at his pleasure, by the use of apt words to indicate his intention so to do. The intention of the party is always to be sought in the interpretation of deeds, as in other written instruments. If the language leaves that intention at all doubtful, the instrument should be examined and construed, when practicable, by the light of the circumstances which surrounded and were connected with the existence of the instrument.

"To hold that a party may not bound a grant by the bank, margin, side, or shore of a stream of water, or by the side of a way, wall, ditch, or other similar object, would involve an absurdity. In all cases where the language used clearly shews such to be the intention of the grantor, the bank, side, margin, or shore, become themselves monuments, and are to be treated as such. Such is the rule of law." He cites *Child v. Starr*, 4 Hill, N. Y. 369, 5 Denio 599; *Halsey v. McCormick*, 3 Kernan N. Y. 296; *Storer v. Freeman*, 6 Mass. 435; *Sizer v. Devereux*, 16 Barb. 160; *Hatch v. Dwight*, 17 Mass. 289; *Bradley v. Rice*, 13 Maine 198; *Dunlap v. Stetson*, 4 Mason 349; 3 *Kent's Com.* 434.

As to the prescriptive right claimed by the defendant,

I think the verdict was right. The weight of evidence seems to me on this point to be with the plaintiff. The learned Judge who tried the cause finds expressly for the plaintiff on the question of possession. That this is not a *pro forma* finding is apparent from his note, for the reservation is to enter the verdict for the defendant should the Court be of opinion, *from the description contained in the deed, that the defendant's deed covers the whole of the land in dispute.*

On the evidence before us I do not think we ought to reverse the finding of the learned Judge on the question of the twenty years' possession. He had the opportunity of seeing and hearing the witnesses, and was in a position to form a better opinion as to which should be relied on in the conflict of testimony, than we are. If I had a strong conviction that I should have found the other way on the evidence, which I have not, I should hesitate before reversing the finding of the learned Judge on this point.

On the whole I think the appeal should be allowed, the judgment of the Court of Common Pleas should be reversed, and the rule *nisi* in that court to enter a verdict for the defendant, should be dismissed with costs.

There will be no costs on either side on this appeal.

SPRAGGE, C.—It appeared to me at the close of the argument, (and I continue to think), unless the point in question were settled by decided cases, the words used “to the top of the bank,” there being in fact on the ground a bank to which these words would apply, import, not to the centre of the river nor to its margin, but to the top of the bank literally. And this construction is strengthened, I think, by the use of the words “to a post planted at the top of the bank.” In fact, as it appears, no post was actually planted, but the use of the words indicate a spot where it was intended that a post should be planted, and could not be a place where from its nature a post could not be planted.

I agree in the judgment of the learned Chief Justice of Ontario.

DRAPER, C. J. of Appeal, delivered a written judgment, affirming the judgment of the Court below, but which was mislaid before being handed to the reporter.

STRONG, J. A., and BLAKE, V. C., concurred with Richards, C. J.

GALT, J., concurred with Draper, C. J. of Appeal.

*Appeal allowed.*





A DIGEST  
OF  
ALL THE REPORTED CASES  
DECIDED IN  
THE COURT OF COMMON PLEAS;

FROM TRINITY TERM, 40 VICTORIA, TO HILARY TERM, 40 VICTORIA.

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ACCEPTANCE.

*Of goods.*]—See SALE OF GOODS, 2.

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ACCIDENT.

*See* WAYS, 1, 2.

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ACKNOWLEDGMENT.

*In bar of Statute of Limitations.*]—*See* LIMITATIONS, STATUTE OF, 3.

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ACTION.

*Chose in—Assignment of.*]—*See* DEBENTURES—FOREIGN JUDGMENT.

*For counsel fees.—Election petition.*]—*See* PARLIAMENT.

*Right of brother to maintain action for seduction.*]—*See* SEDUCTION.

*For supplying liquor contrary to notice—Right to maintain without proof of actual damage.*]—*See* TEMPERANCE ACT, 1864.

ADVERTISEMENT.

*Right to continue — Amount of charges.*]—S. & C., the proprietors of a weekly newspaper, seeing in another paper an advertisement of defendants' company inviting subscriptions for stock, and stating that the share lists would close on the 10th December, 1874, on the 3rd November, telegraphed H., the defendants' managing director, to ask if they might insert it in their paper, to which H. replied, "Yes. In the meantime send terms, must be low." The advertisement accordingly appeared in the paper on the 5th November, and was continued till 21st January, 1875, with an alteration made on the 26th November by B., defendants' agent at Toronto, being 12 insertions, for which plaintiff claimed at the rate of 10 cents per line, or \$32 for each insertion. On the 10th December, S. & C. drew on defendants for \$160, the sum then due at that rate, at 30 days, which was paid; and this action was brought to recover the balance, \$224. There was no ex-

press contract to pay at such rate, but S. said that in answer to H.'s telegram, he wrote to him, that their charge was 10 cents a line; and a notice to that effect also appeared in the paper. H. denied the receipt of the letter. In action by plaintiff as assignee of S. & C.

*Held*, GALT, J., dissenting, that the plaintiff could not recover, for that, even if the whole 12 insertions were allowed, the amount paid was, upon the evidence set out in the case, a fair remuneration therefor.

Per GALT, J., the plaintiff was entitled to recover \$32, for one more insertion, for although the advertisement shewed that it should not have been continued after the 10th December, yet the dealings between the parties precluded defendants from questioning the rate of charges.—*Sinclair v. Ottawa Iron and Steel Co.*, 410.

*In Gazette—Evidence of taxes in arrear.*]—See ASSESSMENT AND TAXES, 1.

## AFFIDAVIT.

*Bona fides of chattel mortgage.*]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1—INSOLVENCY, 4.

## AGENT.

*Insurance.—Authority of.*]—See INSURANCE, 1, 6.

*Application filled in by, where insured illiterate person—Effect of.*]—See INSURANCE, 5.

## AGREEMENT.

See CONTRACT.

## ALTERATION.

*Of school sections—By-law authorizing—Appeal to county council.*]—See PUBLIC SCHOOLS.

## APPEAL.

*Costs.*]—On an appeal to the Court of Appeal, the Court being equally divided, the appeal was dismissed with costs.—*McKenzie et al. v. Kittridge* (in Appeal), 65.

*To county council—By-law authorizing alteration of school sections.*]—See PUBLIC SCHOOLS.

## APPLICATION.

*For insurance—Agent filling in where insured—Illiterate person.*]—See INSURANCE, 5.

## APPROPRIATION.

*Of goods—Destruction by fire—Property passing—Delay in accepting.*]—See SALE OF GOODS, 2.

*Of goods to answer warehouse receipt—Necessity for.*]—See WAREHOUSE RECEIPT.

## ARBITRATION.

1. *Nisi Prius submission—Award thereunder—Motion to set aside—C. L. P. Act sec. 160, 39 Vic. ch. 28 sec. 5 O.*]—Motions to set aside or refer back awards made on nisi prius references under the 160th section of the C. L. P. Act, as contemplated by the 5th sec. of 39 Vic. ch. 28 O.,

are only such motions as were allowable before the passing of the Act.

Where, therefore, a motion was made to set aside or refer back the award of the arbitrator merely on the ground of the decision arrived at by the arbitrator being against the evidence or weight of evidence, the motion was refused. — *Tanner v. Sewery*, 53.

2. *Nisi Prius* submission—Award thereunder—Motion to set aside—*C. L. P. Act* sec. 160, 39 *Vic. ch.* 28 sec. 5, *O.*—*Held*, that the Act 39 *Vic. ch.* 28, sec. 5, *O.*, does not apply to *nisi prius* references by consent under the 160th section of the *C. L. P. Act*, so as to enable the Court to reopen the award on the general merits.

*Quere*, whether the Act applies in any case to references entered into before its passage.

The question of costs considered. — *Nagle v. Latour*, 137.

## ARCHITECT.

*Claim for services—Loss sustained by negligence of—Right of defendant to deduct.*—*See* WORK AND LABOUR.

## ASSESSMENT.

*On Mutual Insurance Policy—Non payment of—Waiver—Pleading.*—*See* INSURANCE, 4, 7.

*See* ASSESSMENT AND TAXES.

## ASSESSMENT AND TAXES.

1. *Sale of land for taxes—Proof of taxes in arrear and amount*—32

*Vic. ch.* 36, *secs.* 130, 155, *construction of.*—In ejectment under a tax deed plaintiff, to prove the taxes being in arrear, produced the treasurer's books containing such entry : *Held*, sufficient *prima facie* evidence.

*Held*, also, that the recital in the tax deed, and the advertisement in the *Gazette*, was sufficient evidence of the amount of taxes due, but not of the warrant to sell.

*Held*, also, that sec. 130 of 32 *Vic. ch.* 36, *O.*, does not dispense with proof of the warrant or cast the burden of negating its existence on the objector to it.

*Held*, also, that under sec. 155 the two years, after which the deed is made valid, must elapse after the execution of the deed, and not from the time of sale.—*Hutchinson v. Collier*, 249.

2. *Sale of land for taxes—Description—Assessment.*—On a tax sale certain land assessed for taxes was described in the assessment as the north part of a certain lot containing 30 acres; and the certificate and deed were of the same piece.

*Held*, that this description included the most northerly thirty acres only, and that it and no other part was affected by the assessment.

Of the thirty acres so assessed it appeared that portions thereof were vested in the Crown, in other owners, and occupied as gravel roads.

*Held*, that the assessment was void as to such portions; and being void as to part was void as to the whole; and that the deed made in pursuance thereof was void also.—*Ley v. Wright*, 522.

## ASSIGNEE IN INSOLVENCY.

*Right to question chattel mortgage's title—Sale of goods en bloc without creditors' sanction—Rights of purchaser.*—See INSOLVENCY, 4.

## ASSIGNMENT.

*Of chose in action.*—See DEBENTURES—FOREIGN JUDGMENT.

## ATTORNEY.

*Liability for counsel fees received.*—See PARLIAMENT.

## AWARD.

See ARBITRATION.

## BAILIFF.

*Illegal entry—Liability of landlord for act of.*—See DISTRESS.

## BANK.

*Of River—Land bounded by—Top of bank—Deed—Possession—Evidence.*—See WATER AND WATER COURSES.

## BANKS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2 — WAREHOUSE RECEIPTS.

## BARRISTER.

*Counsel fees.*—See PARLIAMENT.

BARRISTERS CALLED, 46,  
223, 536.

BILLS OF EXCHANGE AND  
PROMISSORY NOTES.

1. *Promissory notes*—*Note made in New York discounted in Ontario—Usury—Foreign law.*—B. Bros. & Co., carrying on business at Morristown and Syracuse in the State of New York, and also at Brockville in Ontario, on the 11th October, 1872, at Morristown, signed a promissory note for \$500 at three months, payable at a bank at Syracuse to the order of C. F., a sleeping member of the firm, who at that time and until after the maturity of the note resided at Brockville. The note was endorsed by C. F., as also, but merely for the accommodation of the firm, by one H. H. and one A. B., both residents of Syracuse. The note so endorsed was handed to J. W. B., one of the firm, who resided at Brockville, and was there negotiated by him with a person named Harding at a rate exceeding 7 per cent., and Harding sold it to the plaintiff, who also resided in Brockville. The note was left by the plaintiff with a banker at Ogdensburg, N.Y., for collection, and at its maturity H. H. came over to Brockville and saw the plaintiff, who agreed to accept in renewal thereof the joint note of H. H., A. B., and the defendant at six months, which was accordingly made and deposited with the Ogdensburg banker, who then gave up the previous note.

*Held*, that the note of the 11th October, 1872, although drawn up and made payable in the State of New York, was in fact made and became a binding contract on all the parties

thereto, on its being discounted at Brockville, and must therefore be deemed a Canada contract and governed by our laws; and that therefore the law of New York, which made void any note discounted at a higher rate of interest than 7 per cent., or any note in substitution thereof, did not apply.

The plaintiff, therefore, having sued defendant on the last named note: *Held*, that he was entitled to recover.—*Cloyes v. Chapman*, 22.

2. *Promissory note—Stamps—Endorsement in blank*—31 Vic. ch. 9, sec. 4, D.—37 Vic. ch. 47, secs. 3, 12, D.]—On the 9th September, 1875, defendant endorsed a promissory note made by S. & C., bearing that date, and payable to him four months after date at the plaintiffs' branch at Ottawa, but without any amount being filled in. On the same day, C. deposited it with the plaintiffs, authorizing them to fill it in for the amount of S. & C.'s then due paper, as also for other paper falling due before the 22nd October. On the 21st October, the plaintiffs filled in the note for \$4,835.84, which included defendant's then due paper, a sum of \$2,000 coming due on the following day, and \$2.94, the amount of the stamps which they then affixed. The stamps so affixed were sufficient to cover double duty, and were obliterated by writing across them the date on which they were so affixed, namely, 21st October, 1875.

*Held*, that defendant, by so endorsing the note, authorized plaintiffs, as *bond fide* holders for value, to fill in the amount, and to affix and cancel the requisite stamps in the mode required by law; and that the note then became a completed note,

but speaking from its original date, from which the four months would be counted.

By 37 Vic. ch. 47, sec. 3, D., it is provided that in case of a bank making or becoming the holder of a note not duly stamped, and knowing the same, and not immediately affixing and cancelling the proper stamps, within the meaning of 31 Vic. ch. 9, it should not only forfeit a penalty of \$500, but be unable to recover on such note, or make it available for any purpose whatever, and that it should be of no effect in law or equity.

*Held*, that the stamps here were not properly cancelled; for if affixed as agents of the makers, which the including them in the amount of the note was evidence of, then, under sec. 4 of 31 Vic. ch. 9, D., the date of the obliteration must accord with that of the note; whereas, if looked upon as subsequent holders, and as affixing double duty, then under sec. 12, as substituted by 37 Vic. ch. 47, sec. 2, the initials or name as well as the date are required.

*Semble*, that the privileges accorded by the latter part of this substituted sec. 12 to holders who from error or mistake do not at the proper time affix the double duty, does not apply to banks, &c.—*Le Banque Nationale v. Sparks*, 320, (a).

*Authority of agent to receive note for premium.*]—See INSURANCE, 6.

*Right of individual partner to bind firm by.*]—See PARTNERSHIP.

See BILLS OF SALE AND CHATTEL MORTGAGES 1.

(a) This case has been affirmed on appeal, but is not yet reported.

## BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Chattel mortgage—Security against endorsements—Duration of liability—Statement of liability—Affidavit of bona fides—Consol. Stat. U. C. ch. 45, sec. 5.*—In a chattel mortgage to secure the plaintiff, the mortgagee, against certain notes on which he was an endorser, the notes were set out, and were all payable within the year; but in the recital the mortgage was stated to be executed not only as security against these notes, but also against any note or notes thereafter to be endorsed by the plaintiff for the mortgagor's accommodation by way of renewal of the said recited note, or otherwise howsoever. The proviso was, for the payment of the said notes, and all and every other note or notes which might thereafter be endorsed by the mortgagor for the plaintiff by way of renewal of the aforesaid note, or otherwise; and the covenant was to pay the said note, and all future and other promissory notes which the said mortgagee should thereafter endorse for the accommodation of the mortgagor.

*Semble*, that the mortgage was on its face invalid, in not shewing that the liability of the mortgagor was limited in duration to one year, as required by Consol. Stat. U. C. ch. 45, sec. 5; but the affidavit made on refiling the mortgage shewed that no such restriction was intended, the notes having been several times renewed, and only a small sum paid on them; and on this ground therefore the mortgage was held bad.

*Held*, also, that the mortgage was invalid, in consequence of the affidavit of *bona fides* not stating the amount of the liability intended to

be created and covered; for the covenant shewed that it was intended as a security against the notes specified, and any other notes which might be endorsed, and the affidavit stated that it was executed to secure against the payment of such liability.

*Quere*, as to the effect of the word *note*, instead of *notes*, being used in the affidavit and mortgage.

A second mortgage for the same reasons was also held bad.

A third mortgage, subsequently given, contained nearly all the notes referred to in the above mortgages, while it not only appeared that none of such notes were then in existence, they having all been renewed several times and reduced in amount, but that it also contained a further note which was not endorsed at all.

*Held*, that this mortgage was also bad, as it could not be said to contain a true statement of the plaintiff's liability.—*Kough v. Price*, (*Assignee*.) 309.

2. *Goods and chattels—Change of possession—C. S. U. C. ch. 45.*—Where goods in a shop or other unoccupied building under lock and key, are sold by the owner, and the key delivered to the purchaser, who goes to the place and examines and checks over the goods, and then locks up the place again:

*Held*, that this will constitute an actual and continued change of possession, so as to satisfy the statute, and the purchaser need not either personally, or by some one for him, remain in possession or remove the goods.—*McMartin v. Moore*, 397.

*Description of goods—Affidavit—Insolvent Act—Sale en bloc by assignee—Rights of purchaser.*—See INSOLVENCY, 4.

BOND.

*Goods entered in consignee's name on bond—Duties unpaid—Right to stop in transitu.*—See STOPPAGE IN TRANSITU.

BONUS.

*Conditions on which aid granted to Railway Co.—Validity of.*—See RAILWAYS, 2.

BOUNDARY.

*Line fence—Title by possession.*—See LIMITATIONS, STATUTE OF, 1.

*Double front concession—Evidence of.*—See SURVEY.

BROTHER.

*Action of seduction by—Pleading.*—See SEDUCTION.

BY-LAW.

*Authorizing alteration of school sections—Appeal to county council.*—See PUBLIC SCHOOLS.

*Repeal of by-law opening up road allowance—Effect of.*—See WAYS, 3.

See MUNICIPAL CORPORATIONS.

CANCELLATION.

*Of stamps—What sufficient.*—See BILLS OF EXCHANGE AND PROMISORY NOTES, 2.

*Of insurance—Evidence of mailing, notice of.*—See INSURANCE, 6.

CARRIERS.

*Carriage of goods—Through contract—Conditions—Evidence.*—See RAILWAYS, 1.

*Dangers of navigation—Exemption.*—See SHIPPING, 2.

CERTIFICATE.

*Of payment of stock—Registration of.*—See CORPORATIONS.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

CHATELS.

*Title to under Statute of Limitations—Conversion.*—See TROVER.

*Change of possession.*—See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

See GOODS.

CHOSE IN ACTION.

*Assignment of.*—See DEBENTURES—FOREIGN JUDGMENT.

CLIENT.

*Counsel fees—Property of, and not of attorney.*—See PARLIAMENT.

COMMISSIONER OF CROWN LANDS.

See CROWN LANDS.

## COMPANY.

*See* CORPORATIONS.

## COMPENSATION.

*For sheep killed by dogs—Liability of towns.*—*See* MUNICIPAL CORPORATIONS, 2.

## COMPOSITION.

*Acceptance of—Evidence.*—*See* INSOLVENCY, 2.

## COMPOSITION AND DISCHARGE.

*Deed of—Validity of.*—*See* INSOLVENCY, 6.

## CONCESSION.

*Double front—Boundary—Evidence.*—*See* SURVEY, 2, 3.

## CONDITIONS.

*Shipping bills—Railways.*—*See* EVIDENCE.

*Insurance — Property becoming vacant—Notice—Agent—Authority of—Evidence.*—*See* INSURANCE, 1.

*As to furnishing particulars of loss.*—*See* INSURANCE, 3.

*On carriage of goods by railway—Through contract—Evidence.*—*See* RAILWAYS, 1.

*Under which bonus granted—Validity of.*—*See* RAILWAYS, 2.

## CONSIDERATION.

*Agreement not to sue.*—*See* CONTRACT, 1.

## CONSIGNEE.

*Goods bonded in name of—Duties unpaid—Stoppage in transitu.*—*See* STOPPAGE IN TRANSITU.

## CONTRACT.

1. *Agreement — Consideration — Agreement not to sue.*—Declaration: that defendants were creditors to over \$4,000 of a firm who had assigned all their estate and effects to one F. in trust for their creditors, and F. as such assignee had sold certain of the goods so assigned to the plaintiff, and been paid therefor a large sum of money, in which defendants as such creditors became interested: that afterwards a certain creditor of the firm's creditors, claiming that the assignment was invalid, took the said goods in execution, whereupon the plaintiff claimed to recover back his purchase money from F., of all of which the defendants had notice: that the plaintiff was indebted to the defendants and would have been unable to pay them, unless he could recover the value of the goods seized either from F. or the persons who took the goods: that defendants thereupon promised the plaintiff that if he would refrain from suing F., and would sue G., the creditor, and D., the bailiff, who took the goods in order to test F.'s title, which they were interested in determining, they, defendants, would indemnify the plaintiff against all costs, &c., which he might sustain in bringing such

action, and would, in the event of his failing to recover from G. and D. the value of such goods, repay to him the money which he had paid to F.: that thereupon the plaintiff, relying upon such promise, agreed to and did refrain from suing F., and sued and recovered judgment against G. and D. for the value of said goods, and incurred costs in so doing, but was unable to realize either the said damages or costs, and that defendants had not indemnified him, whereby, &c.

*Held*, declaration good: that it shewed a sufficient consideration for defendants' promise, in the plaintiff, at defendants' request, refraining from suing F. and suing G. and D., even if it had not been also alleged, as it was, that defendants had an interest in maintaining F.'s title to the goods.—*Macklin v. Kerr, et al.*, 47.

2. *Agreement—Incomplete performance—Quantum meruit—Mitigation of damages.*]—By an agreement between the parties, dated 21st October, 1872, plaintiffs, who were advertising agents, agreed to place defendant's cards in the top space of their advertising frames in 100 railway stations, specified, and to hang his cards in all the railway stations under their control where it did not appear in the frames, for five years, the defendant to pay therefor \$200 per annum, by quarterly payments.

The plaintiffs only inserted the cards in frames at ninety-nine stations, and not in all cases, though usually, at the top, and hung them up separately in 144 stations; but they did not properly maintain the cards, there being in 1875, sixteen places where cards were not in the frames, and about forty where they

were not at the top, and similar defaults occurred in 1873. The defendants paid the first quarter's payment, but refused to pay more, on the ground that the contract was not performed, but it was proved that though they were aware that plaintiffs were not literally performing the contract, they never notified them to discontinue the advertisements.

*Held*, that plaintiffs might recover the actual value of their services on a *quantum meruit*, the defendants, if damnified, being entitled to claim a reduction from the contract price for the default, or to bring a cross action therefor.—*Foster et al. v. Wilson*, 543.

*Master and servant—Mutuality.*]—See MASTER AND SERVANT.

*For lease—Present demise—License—Evidence.*]—See LANDLORD AND TENANT.

*For sale and hire of piano—Property passing—Evidence.*]—See SALE OF GOODS, 1.

*To cut timber—Property passing—Destruction by fire—Appropriation—Delay in accepting.*]—See SALE OF GOODS, 2.

*Goods supplied to vessel—Contract by master—Evidence of ownership—Liability.*]—See SHIPPING, 1.

See ADVERTISEMENT—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—CROWN LANDS, 1—EVIDENCE—PATENTS FOR INVENTIONS—RAILWAYS, 1, 2.

## CONTRIBUTORY NEGLIGENCE.

*Defective sidewalk—Accident.*]—See WAYS, 2.

## CONVERSION.

*Statute of Limitations.*] — See TROVER.

See WAREHOUSE RECEIPTS.

## CONVEYANCE.

See DEED.

## CONVICTION.

*For sale of liquor under 37 Vic. ch. 32, O.—Objections to information and conviction—32–33 Vic. ch. 29, sec. 32, D., ch. 31, sec. 5, D.*]—See TAVERNS AND SHOPS.

## CORPORATIONS.

*Shareholder—Payment of individual stock—Registration of certificate—Consol. Stat. C. ch. 63, secs. 33, 35.*]—On appeal to the Court of Appeal, DRAPER, C. J. of Appeal, and PATTERSON, J., were of opinion that the judgment of the Court of Common Pleas—namely, that under Consol. Stat. C. ch. 63, secs. 33 and 35, a shareholder, on paying up his shares, and registering a certificate thereof, even though after the expiration of the thirty days mentioned, was exempt from all liability for future as well as existing debts—should be affirmed. BLAKE and PROUDFOOT, V.CC., were of opinion that to create such exemption it was necessary to register the certificate thereof within the thirty days, and that the judgment therefore should be reversed.

The Court being equally divided, the appeal was dismissed with costs.

—*McKenzie et al. v. Kittridge et al.* (in Appeal), 65.

See MUNICIPAL CORPORATIONS.

## COSTS.

*Indemnity against.*] — See CONTRACT, 1.

*Election petition—Counsel fees—Action for.*]—See PARLIAMENT.

See ARBITRATION, 2 — CORPORATIONS.

## COUNSEL.

*Fees of—Action for—Election petition.*]—See PARLIAMENT.

## COUNTY.

*New—Appointment to, of treasurer of provisional corporation—Liability of sureties.*]—See MUNICIPAL CORPORATIONS, 1.

*Towns withdrawn from—Liability for sheep killed by dogs.*]—See MUNICIPAL CORPORATIONS, 2.

## COUNTY COUNCIL.

*Appeal to—By-law authorizing alteration of school sections.*]—See PUBLIC SCHOOLS.

## COUPON.

*Meaning of—Chose in action—Assignment of—Pleading.*]—See DEBENTURES.

## COURT.

*Equally divided — Judgment — Costs.*]—See CORPORATIONS.

## CROSS-ACTION.

See CONTRACT, 2.

## CROWN LANDS.

*Timber license—Renewal of, subsequent to letters patent—Endorsement of Commissioner of Crown Lands on patents—Effect of.*]—To an action for taking the plaintiff's timber defendant pleaded, on equitable grounds, that at the time of an application to the Commissioner of Crown Lands for patents to certain ungranted lands of the Crown, upon which the timber grew, it was agreed between the applicants and the Commissioner that the lands should be granted subject to a timber license to the defendant then in force, and to a renewal of such license, if granted : that on the patents subsequently issuing, granting the lands absolutely to the patentees, the commissioner endorsed thereon and signed a memorandum of such agreement, and on the expiration of the license renewed it : that the timber was cut during such renewal : and that the plaintiff acquired his title from the patentees, with full knowledge of the premises.

*Held*, on appeal, affirming the judgment of the Common Pleas, that such endorsement and the renewal of the license, were unauthorized and invalid, and that the plea shewed no defence.

*Quære*, whether the Crown could have obtained the rescission of the

patents, on the ground of improvidence on the part of the commissioner in endorsing the agreement, instead of inserting it in the instrument.—*Contois v. Bonfield*, (in Appeal) 84.

*License to cut timber—Free grant territory—Right to timber after issue of patent—31 Vic. ch. 8, O.*]—*Held*, that a license to cut timber on lands comprised in the Free Grant territory, under the Free Grant and Homestead Act of 1868, 31 Vic. ch. 8, O., and located under that Act, does not enable the licensee to cut timber after the issue of the patent, although during the currency of the license year.—*Anderson v. Muskoka Mill and Lumber Co.*, 180.

## DAMAGES.

*Mitigation of.*]—See CONTRACT, 2.

*Proof of—Notice not to supply liquor.*]—See TEMPERANCE ACT, 1864.

See CONTRACT, 1.

## DEBENTURES.

*Coupon—Meaning of—Chose in action—Assignment of—Pleading.*]—A declaration alleged that defendants, by their bond or debenture, &c., did bind themselves, &c., to pay the bearer of the said debenture on, &c., \$1000, and interest thereon half yearly at seven per cent. per annum on the 1st of March and September, at a named place, on presentation of the proper "coupons" therefor, and then annexed to the said bond, &c.: that the defendants delivered the bond to C. & Co., who thereby became the lawful holders of the said

bond and coupons : that, after the making of the said bond, the coupon for \$35, being the instalment of interest due 1st September, 1873, was duly presented at the said place, and was not paid, but was dishonoured, and payment refused ; and that the said coupon and all claims in respect thereof have been assigned to the plaintiff, who now sues for the recovery of the amount thereof.

*Held*, declaration bad, for that it did not appear what a "coupon" was, or that its assignment alone gave any right of action, the covenant to pay interest being contained in the bond.—*McKenzie v. Montreal and Ottawa Junction R. W. Co.* 224.

*Requirements of*—*Rate not payable within year, and no special rate*—*Signature.*—*See PUBLIC SCHOOLS.*

*See RAILWAYS, 2.*

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## DEBT.

*Assignment of.*—*See FOREIGN JUDGMENT.*

*What constitutes a debt under 22 Vic. ch. 20.*—*See WAREHOUSE RECEIPTS.*

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## DEED.

*Escrow — Dower — Title.*—No form of words is necessary to constitute the delivery of a deed as an escrow, but the facts and surrounding circumstances may be looked at to see whether such was the intention of the parties.

On a sale of land the deed and mortgage back for the unpaid purchase money were executed respectively by the vendor and purchaser at

one K.'s, and left with him until their respective wives should come in and bar their dower ; but there was nothing to shew that the instruments were to have no operation until the dower should be barred, nor until a good title was shewn, nothing having been said at the time as to title, whilst it appeared that the defendant, the purchaser, had been for years in possession of the land, had made a payment on the mortgage, which was endorsed thereon, and used the deed in endeavouring to raise money on the land ; and it also appearing that the covenants in the deed were sufficient to protect the purchaser against any claim for dower or against certain incumbrances afterwards discovered.

*Held*, that there was nothing to justify the inference that the instruments were delivered as escrows until the dower should be barred or a good title shewn.—*O'Connor et al. v. Beaty*, 203.

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## DELAY.

*Inaccepting goods*—*Appropriation*—*Destruction by fire*—*Property passing.*—*See SALE OF GOODS, 2,*

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## DELIVERY.

*Of goods.*—*See SALE OF GOODS, 2.*

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## DEMISE.

*See LANDLORD AND TENANT.*

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## DEMURRER.

*See INSOLVENCY, 1.*

DESCRIPTION.

*Of land sold for taxes.*—See  
ASSESSMENT AND TAXES, 2.

*Of goods in chattel mortgage.*—  
See INSOLVENCY, 2.

*Of land bounded by river.*—See  
WATER AND WATER COURSES.

DETINUE.

See EXECUTORS.

DISCHARGE.

*Deed of composition and—Validity of*—See INSOLVENCY, 6.

DISTRESS.

*Illegal entry—Liability of landlord for bailiff's act.*—An entry by a bailiff under a distress warrant for rent, must be through the ordinary and natural means of ingress to the place where the distress is about to be made.

In this case the plaintiff's and the adjoining house were under one roof, as were also the kitchens in the rear, over which was a dark loft, which was undivided, and access to which was through a trap door in the ceiling of each kitchen. The bailiff, acting under a distress warrant delivered to him by the landlord, entered the adjoining house, got through the trap door in that house into the loft, and then removing the trap door in the plaintiff's house, descended into the kitchen, and distrained.

*Held*, that the distress was illegal.

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*Held*, also, that the landlord was liable for the bailiff's act.—*Anglehart v. Rathier et al.*, 97.

DOGS.

*Sheep killed by—Compensation—Liability of towns.*—See MUNICIPAL CORPORATIONS, 2.

DOWER.

See DEED.

DRAIN.

*Open—Accident caused by—Liability of corporation.*—See WAYS, 1.

DUNKIN ACT.

See TEMPERANCE ACT OF 1864.

DUTY.

*Stamps.*—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

*Non-payment of—Goods bonded in consignee's name—Stoppage in transitu.*—See STOPPAGE IN TRANSITU.

EJECTMENT.

*Boundary—Onus of proof.*—See SURVEY, 1.

ELECTIONS.

*Petition—Counsel fees—Action for.*—See PARLIAMENT.

## EMILY, TOWNSHIP OF.

*Side lines.*—See SURVEY, 2.

## ENDORSEMENT.

*In blank—Effect of.*—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

*Security against in chattel mortgage.*—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

*Of Commissioner of Crown Lands on patents.*—See CROWN LANDS, 1.

*Of warehouse receipt—Effect of.*—See WAREHOUSE RECEIPTS.

## ENTRY.

*Illegal, to distrain—Liability of landlord for bailiff's act.*—See DISTRESS.

*By owner to retake possession.*—See LIMITATIONS, STATUTE OF, 3.  
—SURVEY, 1.

## ESCROW.

See DEED.

## ESTATE.

*Sale of insolvent estate en bloc—What passes under—Right to dispute securities.*—See INSOLVENCY, 5.

*Separate.*—See HUSBAND AND WIFE.

## ESTOPPEL.

*In pais—Equitable plea—Sale of goods—Validity of—Trover.*—See INSOLVENCY, 3.

See ADVERTISEMENT—INSOLVENCY, 5—INSURANCE, 4, 5, 7—WAREHOUSE RECEIPTS.

## EVIDENCE.

*Agreement—Additional parol term—Railways—Conditions.*—Under a verbal contract between plaintiffs and defendants, the defendants agreed to carry certain petroleum oil of the plaintiffs in covered cars, and on the faith of its being so carried it was delivered to the defendants, but it was carried in open cars, and a large quantity was thus lost. On the delivery of the oil to defendants, the plaintiffs signed a "Request note," which said nothing about covered cars, and under which the goods were stated to be sent subject to certain terms and conditions endorsed thereon.

*Held* that the verbal contract in no way varied or contradicted the writing, and must be incorporated with it, so that the whole contract must be read as for carriage in covered cars.

In this case a nonsuit was entered for the plaintiff's omission to give notice in writing of their claim within 24 hours of the delivery of the goods to defendants' freight agent at Halifax, in pursuance of a condition to that effect: but as the pleas did not set up that there was such an officer there, and the evidence in the case had not been fully given, a new trial was granted, with liberty to the parties to amend their pleadings.—*Fitzgerald et al. v. Grand Trunk R. W. Co.*, 528.

*Of mailing notice cancelling insurance.*—See INSURANCE, 6.

*Proof of original monuments—Onus of proof.*—See SURVEY, 1.

*Notice not to supply liquor—Proof of damages—Recalling witness.]—See TEMPERANCE ACT, 1864.*

*See ASSESSMENT AND TAXES—DEED—EXECUTORS—INSOLVENCY, 2—INSURANCE, 1, 3—LANDLORD AND TENANT—LIMITATIONS, STATUTE OF—RAILWAYS, 1—WATER AND WATERCOURSES—WAYS.*

## EXECUTION.

*See HUSBAND AND WIFE.*

## EXECUTORS.

*Right to pledge personal securities—Detinue—Evidence.]—In detinue for a mortgage, it appeared that the plaintiff and his father were executor and trustees under the will of one C., the plaintiff being also residuary legatee; and that in April, 1864, the plaintiff who was then residing in England, having written his brother to send him some money, the brother, who had access to or possession of the mortgage as agent of the father, since deceased, procured a loan for the plaintiff from the defendant of £25 stg., on his depositing the mortgage with defendant as collateral security, not only for this amount, but for a further sum of \$279, previously obtained by the brother, and then due, shewing defendant C.'s will, and promising to notify plaintiff of the deposit and obtain his consent thereto. The plaintiff was so notified but did not repudiate the transaction, either prior to his return to Canada, in 1867, or until the autumn of 1875, when he served the plaintiff with a demand, and in May, 1876, commenced this action.*

*Held*, that the plaintiff could not recover, for under the circumstances he must be assumed to have authorized the deposit, which he, as executor and residuary legatee, had power to make.

HAGARTY, C. J., *hesitante*, as to the defendant's right to retain for the brother's debt.—*McLean v. Hime*, 195.

## FEEES.

*Counsel—Action for—Election petition.]—See PARLIAMENT.*

## FENCE.

*Boundary line—Title by possession.]—See LIMITATIONS, STATUTE OF, 1.*

## FIRE.

*Destruction of goods by—Property passing—Appropriation—Delay in accepting.]—See SALE OF GOODS, 2.*

## FOREIGN JUDGMENT.

*Debt—Assignment of—35 Vic. ch. 12, O.—Pleading—23 Vic. ch. 24, sec. 1, 39 Vic. ch. 7, O., 31 Vic. ch. 1, secs. 33-5, O.]—Held* that a foreign judgment is *prima facie* a debt, and conclusive on its merits, and as such is assignable under 35 Vic. ch. 12, O., so as to enable the assignee to sue thereon in his own name.

To an action on a foreign judgment, commenced previous to the repeal by 39 Vic. ch. 7, O. of 23 Vic. 24, sec. 1, which allowed the

defendant to set up to the action on the judgment any defence which was or might have been set up to the original suit, the defendant, after the passing of the repealing Act, pleaded several pleas setting up such defences.

*Held*, that they could not be pleaded, for that by 39 Vic. ch. 7, O., the right to so plead was absolutely taken away, and was not preserved by secs. 33.5 of the Interpretation Act, 31 Vic. ch. 1, O.

*Held* also, that one of such pleas, setting up the Statute of Limitations as a bar to the cause of action on which the judgment was recovered, was also bad, in not stating that it was the period of limitation according to the foreign law.

A further plea to the judgment averred that the defendant was not at the commencement of the action, nor down to the judgment, resident or domiciled in, or a subject of the foreign country, and was never served with any process, summons, or complaint, nor did he appear to the action, or before the recovery of judgment, have any notice or knowledge of any process or proceedings in the action, nor any opportunity of defending himself therein.

*Held*, plea good ; but another plea omitting the averment of defendant being a citizen or subject of the foreign country, was held bad.—*Fowler v. Vail*, 417.

## FOREIGN LAW.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

## FREE GRANT TERRITORY.

*License to cut timber—Right to cut after patent issued.*—*See* CROWN LANDS, 2.

## GOODS.

*Change of possession—C. S. U. C. ch. 45.*—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 2.

*Carriage of—Through contract—Conditions—Evidence.*—*See* RAILWAYS, 1.

*Bonded in consignee's name—Duties unpaid—Right to stop in transitu.*—*See* STOPPAGE IN TRANSITU.

*Title to under Statute of Limitations—Conversion.*—*See* TROVER.

*Specific appropriation of—Conversion.*—*See* WAREHOUSE RECEIPTS.

*Sale of.*—*See* SALE OF GOODS.

## HIGHWAYS.

*See* WAYS.

## HIRE.

*Agreement for sale and hire of piano—Property passing—Evidence—Replevin.*—*See* SALE OF GOODS, 1.

## HOMESTEAD ACT.

*See* CROWN LANDS, 2.

## HOTEL.

*See* TAVERNS AND SHOPS.

## HUSBAND AND WIFE.

*Married women—Separate estate—Execution—Trustees—Necessary*

*parties—Consol. Stat. U. C. ch. 73—35 Vic. ch. 16, O.*—To enable a married woman to be sued separately from her husband, under Consol. Stat. U. C. ch. 73 and 35 Vic. ch. 16, O., she must be proved to have separate property to her own use available by execution for the plaintiff's demand, which demand, if in the nature of a contract, must arise by reason of, and upon the faith of her having such separate property.

Under a deed of separation and settlement certain real and personal property was conveyed by the husband to trustees for the sole and separate use of the wife during her life; but that until the children, the issue of the said marriage, should attain the age of twenty-one years, the property was to be used for the maintenance and support of herself and children. And it was proved that the youngest child was only thirteen.

*Held*, that during the minority of the children, this was not such property as was available by execution for the plaintiff's demand; and that the Court could not pronounce judgment in the plaintiff's favour, to be enforced by him on the youngest child attaining twenty-one.

The plaintiff, suing the married woman upon her promissory note, was therefore nonsuited.

Per Gwynne, J.—Where property is vested in trustees to the separate use of a married woman, such trustees are necessary parties.—*Field v. McArthur*, 15.

*Notice by wife not to supply husband with liquor—Proof of damages.*—See TEMPERANCE ACT, 1864.

## ILLITERATE PERSON.

*Application of, filled in by agent.*—See INSURANCE, 5.

## INCUMBRANCE.

See DEED.

## INDEMNITY.

See CONTRACT, 1.

## INFORMATION.

*Conviction for sale of liquor—Objections to.*—See TAVERNS AND SHOPS.

## INSOLVENCY.

1. *Declaration—Demurrer—Insolvent Act of 1875, sec. 36.*—A declaration, after declaring on two bills of exchange in separate counts, proceeded to aver that the debt for which the bills were given, was contracted under such circumstances as to render the defendant liable to imprisonment under the 136th section of the Insolvent Act of 1875. To this averment defendant demurred, treating it as a third count, on the ground that it was defective in not alleging certain facts necessary to bring defendant within the provisions of the Act.

*Held*, that this averment was not the subject of either a plea or demurrer.—*Rutherford v. Eakins*, 55.

2. *Composition—Acceptance of Evidence.*—The defendant, a trader, being in insolvent circumstances, wrote to the plaintiff, a creditor in Scotland, giving him a statement of his account and informing him of his intention to make some arrangement with his creditors, and that plaintiff must rank with the others on his

estate which he stated would not pay more than 50c. in the \$, to which the plaintiff replied, expressing no dissent; and, again, that he was satisfied if there was no preference given. In the meantime defendant had effected an arrangement with his creditors for a composition of 30c. in the \$, on his representation that plaintiff would accept it, without which the whole arrangement would have fallen through, and the defendant must have gone into insolvency. Defendant on the same day, by letter, informed the plaintiff of the arrangement; to which the plaintiff replied without expressing dissatisfaction. Afterwards without dissent he received the instalments of the composition sent to him, and on the receipt of the last instalment he acknowledged it as a payment of "the last instalment of your indebtedness to me."

*Held*, that the plaintiff must be deemed to have accepted the composition with the other creditors, and therefore that he could not sue defendant for the balance.

Remarks as to the form of plea in such a case.—*Mitchell v. Mitchell*, 160.

3. *Sale of goods—Validity—Trove—Estoppel in pais—Equitable plea.*]—To an action of trover by plaintiff as assignee in insolvency of H.; the first count alleging a conversion previous to, and the second count a like conversion subsequent to, H.'s insolvency, to which the common counts were added, the defendant pleaded, on equitable grounds, that H. purported to sell and convey to F. & C. all his stock-in-trade, and executed legal transfers thereof, and represented that he had so sold the same, whereby certain of

his creditors were induced to accept F. & C.'s notes, given, as he alleged, for the purchase money, and to extend the time for the payment of H.'s indebtedness to them, and whereby also other persons were induced to supply F. & C. with goods on credit: that F. & C. were placed in insolvency by compulsory liquidation, and that such creditors and other persons were the creditors who filed claims against F. & C.'s estate: that defendant was appointed assignee, and as such took possession of the goods in F. & C.'s store, consisting of those received from H., as well as goods subsequently supplied to F. & C. as aforesaid, as also of the books used by F. & C., and now claimed by plaintiff: that the goods and book debts as above will not more than pay F. & C.'s creditors: that even if said goods and books were H.'s, he and his assignee are estopped from setting up any claim thereto as against defendant or to the prejudice of F. & C.'s creditors, who through defendant have a lien in equity upon said goods for the amounts respectively due them as aforesaid; and defendant prays that an account may be taken, and defendant declared a trustee for the amount found to be due to the said creditors.

*Held*, by GWYNNE, J., and affirmed by the full Court, plea bad, for as to the goods alleged to be F. & C.'s, they could not be H.'s, of whom plaintiff was assignee; and as to the other goods, the plea averred a sale impeachable by the assignee, and probably in itself an act of bankruptcy; and the matters set up shewed no estoppel in pais.

Per GWYNNE, J. The statute authorizing equitable defences, does not authorize pleading matters which

are merely evidence under a legal plea.—*Mackenzie v. Davidson*, 188.

4. *Chattel mortgage—Description of goods—Affidavit—Insolvent Act—Sale en bloc by assignee—Rights of purchaser.*—On December 3rd, 1875, M. & D. mortgaged to the plaintiffs, amongst other goods, a stumping machine, and lumber wagon complete, blacksmith's tools, lumber, &c., on the mortgagor's premises, which were described, with defeazance on payment of \$1,255 on 1st June, 1876. There was a covenant that the mortgagees might enter and take possession and sell on default, or on any attempt by the mortgagors to sell or part with possession of the goods without the mortgagees' assent, but no provision for the mortgagor's remaining in possession until default. The affidavit of *bona fides* stated that the mortgage was not made for the purpose of protecting the goods against the creditors of M. & D.—not adding, or either of them—or preventing the creditors obtaining their claims against *him*, instead of *them*. On the 27th March, one F. issued an attachment in insolvency against M. & D., and on the 26th April H. was appointed assignee. On the same day H., in consideration of \$300, assigned to F. all his right and interest as assignee to and in all the personal estate, &c., of said insolvents; and on the 26th April F., after reciting the above purchase, in consideration of \$708, assigned to defendant, out of whose possession, the plaintiffs, on the 17th May, 1876, replevied the goods in question, claiming them under the mortgage.

*Held*, that the plaintiff was entitled to succeed; that in the absence of evidence of the creditor's sanction, the sale by the assignee could not be

supported: that it could not be assumed that the assignee intended to pass any title to the goods free from the mortgage: that neither F. nor defendant were in a position to raise objection to the mortgage; and that the plaintiff had a right to replevy, though the mortgage was not due.

*Quære*, whether an assignee in insolvency can raise technical objections to a mortgage not impeachable under the Insolvent Acts.

Per GWYNNE, J.—If the assignee could have avoided the mortgage in the interest of the creditors, he could not transfer such right.

The learned Judge at the trial, also found that the description of the goods in the mortgage, and that the affidavit, were sufficient: that the mortgage was not invalid as creating a preference or under the insolvent law; and that sec. 125 of the Insolvent Act of 1875, did not apply; and the Court concurred in these findings.—*Bertram et al. v. Pendry*, 371.

5. *Sale of estate en bloc—What passes under—Right to dispute securities.*—On the 7th of December, 1874, one L. made an assignment under the Insolvent Act of 1869, and the plaintiff was appointed assignee. On the 28th December, defendants filed their claim for \$132,721.43, setting out certain warehouse receipts held by them as security, valued at \$8,627.43, and other securities, also valued, which reduced the claim for proof to \$99,458. At a meeting of creditors held on the same day a proposal of a firm of L. & C. to purchase the estate en bloc for \$50,000, was accepted. On the 29th December, by resolution of the inspectors, defen-

dants were authorized to retain these receipts at their valuation. On the 13th January, 1875, at a meeting of creditors, it was resolved that further enquiry should be made as to the validity of the receipts, and that the resolution of the inspectors be rescinded, but nothing more was done under it. On the 3rd of February, 1875, a deed was executed by the assignee, which after reciting the agreement for sale to L. & C., the assignee conveyed certain real estate specified, "and all the entire estate, stock in trade, book debts, and effects of said insolvent, of every nature and kind soever, and all the interest of the creditors in the said estate and effects," to hold the "same, and all benefit that can or may be derived therefrom unto said purchasers." L. & C. were creditors of the estate, and had been present at all the meetings of creditors. After this conveyance, a dividend was declared and advertised, to which no objection was made, and the bank received it on the reduced amount, \$99,458, proved for by them. Subsequently L. & C. brought this action in the name of the assignee for the goods covered by the warehouse receipts, on the ground that the receipts were invalid. The assignee, however, stated that he had never objected to their validity, and had intended to allow defendants to retain them; and had given no consent to this action being brought in his name, except what was contained in the transfer; and there was no further evidence shewing that the assignee sold or intended to sell, or L. & C. to purchase the property in dispute.

*Held*, that the action would not lie, for that the claim did not pass under the transfer by the assignee,

who had not authorized the suit, and the Court refused to substitute the names of L. & C. as plaintiffs.

*Quære*, whether, after what had been done by the assignee and inspectors, the claim could have been assigned.—*Mason (assignee) v. Merchants' Bank*, 383.

6. *Insolvent Act of 1875—Deed of composition and discharge.*—By a deed of composition and discharge made between the insolvents of the first part, and the several persons, firms, and corporations, who were creditors of the insolvents, therein after called the creditors, of the second part—after reciting the insolvents' inability to pay their liabilities in full, and their agreement with their creditors for a composition and discharge upon the terms and in the manner therein mentioned, under the provisions of the Insolvent Act of 1875, and the insolvents' agreement to secure the payment of the creditors thereafter mentioned by their notes,—it was witnessed that in consideration of their indebtedness, and of the discharge thereby given, the insolvents covenanted and agreed with all their creditors, collectively and severally, to pay to them and to each of them the amount of the composition specified and agreed upon by several instalments; and for securing the payment of the last three instalments the insolvents covenanted to have conveyed to the assignee the composition notes given to one G. T. G. T., who was not a creditor but a surety to the plaintiffs for defendants' debt, without paying their claim, and without their consent, proved as a creditor and signed the composition deed, and without him there would not have been a sufficient statutory majority.

. *Held*, on demurrer to the pleadings set in this case.

1. That under secs. 10 and 61 of the Act of 1875, a non-assenting creditor need not have proved his claim to entitle him to the benefits of the deed; 2. That the deed was absolute, and not conditional on a delivery of the composition notes being made, the creditor's remedy being on the insolvents' covenant; 3. That the deed was not open to objection as providing only for the partnership debts, for that it applied both to the joint and separate creditors; 4. That under sec. 2, sub-sec. h, and secs. 49-52 of the Act of 1875, the consent to the deed of a majority of those creditors who have proved claims of \$100 and upwards, and representing three-fourths in value of such claims proved, is required; 5. That G. T. had no right to prove.—*Lewis et al. v. Tudhope et al.*, 505.

## INSURANCE.

1. *Condition as to property becoming vacant—Notice fo—Authority of agent—Evidence.*—A condition of a policy of insurance provided that in the event of a failure to notify the company of the premises becoming vacant, or to obtain their consent thereto, the policy became void.

In this case, T., the insured, on the premises becoming vacant, notified the local agent, L., who it appeared, was also aware of the fact. T. then assigned the policy to the plaintiff, who also, previously to the assignment, had notified the agent, and was informed that it was all right. On the plaintiff obtaining the assignment he took the policy to the agent, paid the transfer fee, and obtained the agent's receipt therefor.

The agent then sent the policy to the head office, by whom it was returned with their consent endorsed thereon, and a receipt for the money paid. The agent admitted his knowledge of the vacancy, and did not deny the receipt of the notice; but it did not clearly appear whether the notice had been received by the company itself, and the secretary stated that it had not, and that the agent had no authority to receive it.

*Held*, however, that under the circumstances of this case, the company could not avail themselves of the condition, for they had recognized L. as their agent in the whole dealing so as to warrant the plaintiff in assuming that notice of the vacancy to him was sufficient.—*Williams v. Canada Farmers' Mutual Ins. Co.*, 119.

2. *Proofs of loss—Cash or mutual policy—Pleading.*—To an action by plaintiffs against defendants for the non-payment of the amount of a policy issued by defendants, so far as the declaration shewed, on the cash system principle, defendants pleaded that the plaintiffs did not deliver to the defendants the proofs of loss required by said policy three months before the commencement of the action.

*Held*, no defence; for even if under the Mutual Companies Act, 36 Vic. ch. 44, sec. 33, O., such lapse of time was necessary, that Act merely applied to mutual and not to cash system policies.—*Welsh et al. v. Niagara District Mutual Ins. Co.*, 134.

3. *Particulars of loss.*—By one of the conditions endorsed on a policy of insurance, the insured was required to deliver a particular and

detailed account of the loss, and if required to produce the books of account and other papers, vouchers, original or duplicate invoices.

*Held*, that a reasonable compliance with the condition was only required; that it was therefore sufficient for the insured to furnish such particulars and documents as it was reasonably in his power to do; and that in this case, on the evidence set out in the case, the condition had been complied with.—*Goldsmith v. Gore District Mutual Ins. Co.*, 435.

4. *Premium note—Non-payment—Assessments—Waiver—Pleading.*]—To an action on a mutual insurance policy on a dwelling house and furniture, defendants pleaded that a certain assessment was declared by defendants on plaintiff's premium note, of which assessment the plaintiff had due notice, but did not pay the same, whereby the policy became void.

*Held*, reversing the judgment of HARRISON, C. J., plea good; for that the allegation of due notice, without stating the particulars of the notice or the manner of giving it, was sufficient.

A replication alleged that subsequent to the alleged avoidance, and previous to the loss, defendants levied another assessment which the plaintiff was duly notified of and paid, whereby defendants waived the alleged forfeiture and revived the said policy; and therefore they ought not to be allowed to plead the said plea.

*Held*, affirming the judgment of HARRISON, C. J., replication good, as shewing a clear revival of the policy, and estopping defendants from setting up the previous forfeiture.

A rejoinder alleged, that no part of the assessment mentioned in the plea was or is included in the assessment mentioned in the replication: that before the making of such last assessment the policy had been cancelled and so marked in defendants' books; and that such last assessment was not in fact made upon the plaintiff's policy, but that defendants' secretary through inadvertence and mistake notified plaintiff of said assessment and the amount thereof; and that subsequent thereto, and prior to the loss, several further assessments were made by defendants, to which plaintiff would have been liable unless the policy were cancelled, but by reason of such cancellation, no assessment on the said policy was made, and the said amount in the plea mentioned still remains unpaid; and alleging that defendants were willing and thereby offered to return the amount paid.

*Held*, reversing the judgment of HARRISON, C. J., rejoinder bad, there being no averment of any notification to the plaintiff of the notice having been sent to her and the money received by mistake, nor of it being tendered to or paid back to her, and it appearing that she had been allowed after making the payment to consider herself still insured.—*Smith v. Mutual Ins. Co. of Clinton*, 441.

5. *Agent filling in application—Illiterate person—Vendor's lien—Owner—Occupation.*]—In an action on a mutual policy of insurance, it appeared that to enable the defendants' local agent to fill in the application which formed part of the policy, the insured who was a French Canadian and unable to read or write, truly stated to the agent all

the facts material to the risk, including those relative to title and incumbrances; and the agent then filled in the application, as also the plaintiff's name which he signed as a marksman; but, in so filling it in, the agent, without the authority or knowledge of the insured, misstated the facts as to the title and incumbrances.

*Held*, that defendants, under the circumstances, must be restrained in equity from setting up, under the terms of the statute, 36 Vic. ch. 44, sec. 36, O., or of the conditions on the policy, the act of their own agent as an avoidance of the policy.

A second policy in which as before, the application was filled in by the agent; but the plaintiff had the benefit of the services of his son, who was able to read and write, and who acted as his agent in procuring the insurance, and signed his name to the application, was on that ground distinguished from the above, and the policy held void.

*Held*, that a vendor's lien for unpaid purchase money, according to the law of Quebec, of land situate in that Province, is an incumbrance within the meaning of the question in that behalf in the application.

*Held* also, that a person may truly state that he owns a building erected on the land, notwithstanding such vendor's lien; and also that he occupies such building, notwithstanding that his son and son-in-law live with him.—*Chatillon v. Canadian Mutual Ins. Co.*, 450.

6. *Premium—Payment by note—Authority of agent—Cancellation of insurance—Mailing—Evidence of.*—For the premium payable on an interim insurance on a stock of goods, instead of a cash payment,

the agent received the note of the insured, payable on the 1st of the next month, giving him a receipt as for cash. It was proved that, except in the case of farm risks, where notes might be received, for which there was a printed form on which this one was filled in, the agent had no authority to receive payment otherwise than in cash. *Semble*, that the company were not bound by the agent's act in accepting payment otherwise than as authorized.

By a memorandum on the note, the insurance became avoided if the note were not paid at maturity. The note, made on the 7th October, was payable on the 1st November. The plaintiff paid \$25.36 on account on the 27th October, the note being for \$40. The fire took place on that night. It appeared that the agent on the receipt of the notice from the company that they had cancelled the risk, wrote to the plaintiff, after the fire but before the maturity of the note, returning him the note and the sum paid thereon, which the plaintiff retained, and did not afterwards pay or offer to pay the note.

*Held*, that the insurance was avoided, the premium never having been paid.

By the terms of the interim receipt, it was provided that the directors should have power to cancel the contract at any time within thirty days, "by causing a notice to that effect to be mailed to the applicant," at a specified address. The general manager of the company proved that he directed a letter, declining, to be sent to the plaintiff: that he saw it written and placed with other letters to be sent; and that one H., a clerk in the office, had charge of them, and his duty was to address them to the parties and enter them

in the mailing book. The mailing book was produced with an entry in it of this letter; and H. swore that this entry was in his writing, and that he had no reason to doubt that the letter had been mailed. The plaintiff (the insured), however, swore that he had never received it. Per HAGARTY, C. J.—On this evidence the question of mailing must have been submitted to the jury, who should have found that it had been mailed. Per GWYNNE, J.—A verdict finding otherwise could not have been sustained.—*Johnson v. Provincial Ins. Co.*, 464.

7. *Mutual insurance—Assessment—Forfeiture—Waiver.*—To an action on a policy of insurance, dated 18th February, 1874, for three years, defendants pleaded the non-payment of an assessment made on 24th December, 1875, of \$13.34, on the plaintiff's premium note, payable within thirty days; setting out the particulars, whereby the policy became void.

The plaintiff replied, that on the 1st August, 1876, defendants directed a further assessment of \$13.34 on plaintiff's note for the period between the 18th July, 1876 and 18th February, 1877, of which they notified the plaintiff on the 2nd September, 1876, who thereupon paid \$27.88, in full for said two assessments, and interest on first assessment from the date of its being payable, which defendants accepted, and thereby waived the forfeiture.

*Held*, replication good, without alleging that such payment was before the fire, for it shewed that defendants treated plaintiff as insured with them when they called on him to pay long after the alleged default, and that when the loss happened the

policy was an existing risk.—*Lyons v. Globe Mutual Ins. Co.*, 567.

## INVENTION.

*See* PATENTS FOR INVENTIONS.

## JUDGMENT.

*See* FOREIGN JUDGMENT.

## LAND.

*Sale of.*—*See* SALE OF LAND.

## LANDLORD AND TENANT.

*Agreement for lease—Present demise—License—Evidence.*—On the 1st October, 1875, plaintiff wrote to D., the owner of certain land, in the township of Caledon, that he understood that one M., who had a written lease from D., which had expired, but who had remained on, on the terms of the lease, was going to leave, and that if the farm was for rent he would give D. \$100 a year, and pay all taxes, &c., and requesting an answer by return mail, as he wished to commence ploughing. D., who was then in the United States, replied that he had no objection to plaintiff's terms as to renting the farm; and that he might commence to plough on the following conditions: "I rent to you for one year, with right to sell the farm at any time, you giving up possession thereof when required, on your being paid for labour and seed at valuation, should the purchaser wish possession. I will be up at Caledon as soon as I get home, and make final arrange-

ments as to payment and security." The plaintiff entered and did the ploughing, but without M. having given up possession, or without the arrangements as to payment and security being perfected. Subsequently D. sold to the defendant, who thereupon took possession. It appeared that D. offered to pay the plaintiff for his fall ploughing, but that he did not send in any claim. Evidence was also given of expressions made use of by D. to intending purchasers, referring to plaintiff as the tenant who had the place for a year, but would give up possession on being paid for his ploughing, and as the outgoing tenant who would have to be paid for the ploughing.

*Held*, that there was no present demise, but that the plaintiff merely had a license to enter and plough, pending the conclusion of the proposed bargain, which license was revoked by the entry of defendant, the owner of the fee.

Remarks as to plaintiff's conduct in bringing actions of trespass and ejectment on the same day.—*Stubbs v. Broddy et al.*, 234.

*See* DISTRESS.

## LEASE.

*See* LANDLORD AND TENANT.

## LETTERS PATENT.

*See* CROWN LANDS, 1, 2—PATENTS FOR INVENTIONS.

## LICENSE.

*Timber.*—*See* CROWN LANDS.

*To enter on land—Revocation of.*

—*See* LANDLORD AND TENANT.

## LICENSE ACT.

*See* TAVERNS AND SHOPS.

## LIEN.

*Vendor's—Province of Quebec.*—*See* INSURANCE, 5.

## LIMITATIONS, STATUTE OF.

1. *Title by possession—Boundary line fence.*—Between thirty and fifty years ago the owners and occupiers respectively of adjoining lots, 16 and 15, through whom plaintiff and defendants claimed, erected and maintained at their equal charge a boundary line fence between their lots, and they had respectively been in possession during that period, of the land up to the fence. The plaintiff commenced clearing on the north or rear of his lot, continuing in a southerly direction until within about four chains of the concession line in front, when, to protect the land so cleared, he erected a fence across his lot to the boundary fence, leaving the piece to the south up to the concession line open until about seventeen years ago, when he put up a fence along the concession line; but he had always maintained a roadway from the concession along the line of the fence as the means of access to his house. By a recent survey defendants claimed that the boundary fence was erroneous and encroached on lot 15, and that he was entitled to the piece of land in question, lying between the new line and the boundary fence, and to the south of the fence first enclosed by plaintiff across his lot.

*Held*, that the plaintiff had acquired a title by possession to all the land up to the boundary fence, even though such fence might not be on true line, and encroached on defendants' lot 15; and that under the circumstances, his only having erected the fence along the concession line within the last seventeen years was of no importance.—*Elliott v. Bulmer et al.*, 217.

2. *Tenancy at will—Subsequent determination of and creation of fresh tenancy—Mortgage—38 Vic. ch. 16, O.*—In ejectment it appeared that in March, 1859, the plaintiff told his son, then over 22 years of age, and married, and who had up to that time lived with and assisted the father, to go and live on a certain fifty acres of the lot, the land in question, which had been previously measured off and was wild, and make a living there. The son accordingly entered into possession, cleared nearly all, erected two dwelling houses and a barn, &c., on it, expending some \$500 of his wife's money in so doing, and had lived on it ever since, the land being assessed in his name and the taxes paid by him; without any demand of possession ever having been made by the father, or any claim for rent until about a week previous to 1st July, 1876, when the son refused to pay anything claiming the land as his own. The father stated that he intended it to be the son's after his death, though he did not so inform him: while the son stated that he entered under the expectation and belief that it was to be his, and would not otherwise have done so.

It also appeared that in February, 1865, the son, wishing to raise some money on the land, procured his father to execute a mortgage on it

for \$550, for his, the son's, benefit, he receiving the amount and undertaking to pay it off, which he did, together with the yearly interest as it accrued due, and on the 30th January 1871, the mortgage was discharged. There was no evidence of any communication between the son and the mortgagee.

In September, 1876, this action was commenced.

*Held*, the case having been tried without a jury, that, as a matter of law, the son became upon entry tenant at will to his father, so that the statute began to run in a year from that time: that as a matter of fact, when the mortgage was executed, neither father nor son intended thereby to make any change in the nature of the son's possession, or to create any new tenancy, for which there was no necessity in the interest of the mortgagee: that the existing tenancy at will therefore was not thereby determined, nor any new tenancy at will created: that even if it had been so created, the statute would have begun to run again in February, 1866; and that the plaintiff therefore suing after ten years was barred under the 38 Vic. ch. 16, O.

*Foster v. Emerson*, 5 Grant 135, contra, commented upon and not followed.—*Keffer v. Keffer*, 257.

3. *Possession—Entry by owner.*—In February, 1853, after the expiration of a lease by the plaintiffs to R. for ten years, R. continued in possession; and in 1854 defendant, who had married R.'s daughter, came to reside with R., under a verbal agreement, as he asserted, whereby R. handed over the possession to him; but the evidence shewed that R. and his wife still remained on the

place until his death 'n 1860. After R.'s death his widow and defendant continued to reside on the premises ; but the defendant was frequently absent working for others. In 1862, while defendant was so absent, and the widow alone in actual visible possession, S., the plaintiff's agent, entered, and the widow signed a written instrument, witnessed by S., confessing that she was on the land merely on sufferance of the plaintiffs, and undertaking to give them possession whenever they might require it. Afterwards defendant returned to the premises ; and in 1866 the plaintiffs brought ejectment.

*Held*, that the plaintiff's entry and the acknowledgment signed by the widow in 1862 put an end to defendant's former possession, if any, so that the Statute of Limitations would run only from that period ; and that they therefore were not barred.—*Canada Co. v. Douglas*, 339.

*In action for conversion of goods.*]  
—See TROVER.

See FOREIGN JUDGMENT—SURVEY, 1.

## LINE FENCE.

*Boundary—Title by possession.*]  
—See LIMITATIONS, STATUTE OF, 1.

## LIQUORS, SALE OF.

See TAVERNS AND SHOPS—TEMPERANCE ACT, 1864.

## LOSS, PROOFS OF.

See INSURANCE, 2, 3.

## LUMBER.

*Agreement to cut—Property passing—Destruction by fire—Appropriation—Delay in accepting.*]  
—See SALE OF GOODS, 2.

## MAILING.

*Of notice cancelling insurance—Evidence of.*]  
—See INSURANCE, 6.

## MARRIED WOMAN.

See HUSBAND AND WIFE.

## MASTER.

*Contract by for goods supplied to vessel—Evidence of ownership—Liability.*]  
—See SHIPPING, 1.

## MASTER AND SERVANT.

*Agreement—Mutuality.*]  
—By an agreement signed by both the parties, plaintiff agreed and bound himself to defendant to act as his book-keeper, &c., for five years, for a specified sum in each year, and to pay \$10 per month for board, to be deducted from his salary, and also to pay his washing and other personal expenses. It was added : " This agreement to commence from 1st February, 1876, and end 1st February, 1880."

*Held*, that there was no obligation, either express or implied, on the defendant to continue his business or retain the plaintiff in his employment during the five years.—*Roche v. Walsh*, 555.

## MEMORANDA.

*Barristers called.*—46, 223, 536.

## MISTAKE.

*In affixing stamps.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

## MITIGATION OF DAMAGES.

See CONTRACT, 2.

## MONUMENTS.

*Original—Proof of.*]—See SURVEY, 1.

## MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES—LIMITATIONS, STATUTE OF, 2.

## MUNICIPAL CORPORATIONS.

1. *Provisional corporations—Treasurer of—Subsequent appointment as treasurer of new county—Liability of sureties.*]—The 12 Vic. ch. 78, which provided for the separation of a junior county from a union of counties, also provided for the formation of provisional councils in the junior county until the separation should be perfected, and empowered the provisional council to raise moneys for certain limited purposes, namely, the erection of a court house and jail, and to appoint a provisional treasurer whose duties were limited to the levying, collecting and paying over such moneys. By 13 &

14 Vic. ch. 24, it was provided that on the dissolution being perfected, and the new county formed, all the provisional officers were to continue the officers of the new county until their successors were appointed, and all the by-laws were to remain in force until altered, amended, or repealed. Under the first named Act, the provisional corporation passed a by-law appointing one P. treasurer, and defendants became his sureties for the faithful execution of his office. On the formation of the new county, a by-law was passed repealing the by-law of the provisional corporation under which P. had been appointed treasurer; and they thereafter appointed him treasurer of the new county.

*Held*, that defendants were not liable for P.'s acts as treasurer under such last-named appointment.

*Quære*, whether, if the by-law had not been repealed, and P. had continued treasurer of the new county, defendants would have been liable. — *Corporation of Ontario v. Paxton et al.*, 104.

2. *Sheep killed by dogs—Compensation—Towns—Liability of*—32 Vic. ch. 31, O.]—*Held*, that the 32 Vic. ch. 31, O., which requires municipalities to provide compensation to the owners of sheep killed by dogs, for the damage they have thereby sustained, is not confined to county municipalities and to municipalities within their jurisdiction, but applies also to towns which have withdrawn from the jurisdiction of the county.—*Williams v. Corporation of Port Hope*, 548.

*Bonus to railways—Conditions on which granted—Validity of.*]—See RAILWAYS, 2.

See PUBLIC SCHOOLS—WAYS.

## MUTUAL INSURANCE.

See INSURANCE.

## MUTUALITY

*Of contract.*]—See MASTER AND SERVANT.

## NAME.

*Materiality of*—*Sule of invention to be patented.*]—See PATENTS FOR INVENTIONS.

## NAVIGATION.

*Dangers of*—*Carriers*—*Exemption.*]—See SHIPPING, 2.

## NEGLIGENCE.

*Contributory*—*Neglect to repair sidewalk*—*Accident.*]—See WAYS, 2.

*Of architect*—*Loss sustained by*—*Claim for services*—*Right of defendant to deduct.*]—See WORK AND LABOUR.

## NEWSPAPER.

*Advertisement*—*Right to continue*—*Amount of charges.*]—See ADVERTISEMENT.

## NEW TRIAL.

See WAYS, 2.

## NISI PRIUS.

*Recalling witness.*]—At the trial  
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of a case, at *nisi prius*, the learned Judge having declined to allow a witness twice called in the progress of the suit to be recalled or to wait for the possible arrival of another witness, the Court refused to review the exercise of his discretion in so doing.—*Gleason v. Williams*, 93.

*Reference at*—*Award*—*Motion to set aside.*]—See ARBITRATION.

## NOTICE.

*Of insured property becoming vacant*—*Condition*—*Authority of agent*—*Evidence.*]—See INSURANCE, 1.

*Not to supply liquor*—*Evidence of service*—*Proof of damages.*]—See TEMPERANCE ACT, 1864.

*Of defect in highway.*]—See WAYS, 1.

## OCCUPANT.

*Meaning of.*]—See INSURANCE, 5.

## OWNER.

*Meaning of.*]—See INSURANCE, 5.

*Entry by*—*Possession.*]—See LIMITATIONS, STATUTE OF, 3.

*Of vessel*—*Proof of ownership*—*Liability.*]—See SHIPPING, 1.

## PARLIAMENT.

*Costs*—*Election petition*—*Counsel fees*—*Action for.*]—On the trial of an election petition against the return of a member to the Local Legislature which resulted in favour

of petitioner, to whom the costs were awarded, the defendant was retained by and acted as petitioner's attorney, and M., one of the plaintiffs, a firm of attorneys as well as barristers, acted as petitioner's senior counsel, under an agreement to that effect, with defendant, neither he nor his firm being retained by petitioner. The petitioner's costs were settled by defendant and the respondent's attorney, and defendant received \$1,600, including \$365 counsel fees to M., which M. proved became the property of his firm. The plaintiffs having brought an action against defendant to recover these counsel fees, as money had and received to their use:

*Held*, that they could not recover, for that the costs, including these fees, belonged to the petitioner and not to defendant as attorney.—*Miller et al. v. McCarthy*, 147.

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## PAROL EVIDENCE.

*Admissibility of.*—See EVIDENCE.

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## PARTIES.

*Where trustees necessary.*—See HUSBAND AND WIFE.

*Right to substitute.*—See INSOLVENCY, 5.

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## PARTICULARS OF LOSS.

*Condition as to delivery of—Compliance with.*—See INSURANCE, 3.

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## PARTNERSHIP.

*Authority to bind the firm by notes.*—In April, 1876, F. & C.

entered into partnership for the purpose of purchasing one M.'s interest in a macadamized road contract and completing it; C. alone to provide the necessary funds on his own credit, but F., for the use of his name to secure the contract, to have half the profits. On 2nd May, C., being in want of funds, made a note in his own name for \$150, which was endorsed by one Cockburn, and the proceeds applied to the partnership purposes. On 25th May, he made two further notes for \$175 respectively, one in the name of the firm and the other in his own name, but of the proceeds of the latter note \$87 was applied to partnership purposes. Both these notes were also endorsed by Cockburn. At the same time C. also made a note for \$500 in the name of the firm in favour of Cockburn, as security for his above endorsements. This note Cockburn endorsed to the plaintiff, but without any consideration, and the plaintiff merely stood in Cockburn's place.

*Held*, that there could be no recovery on this note, for as to the \$150 and one of the \$175 notes, they were not made in the partnership name; and as to the other \$175 note, it was outstanding in the hands of a third party.

*Semble*, that one partner in such a business has no implied authority to raise money, even for partnership purposes in the joint name.—*McCord v. Field et al.*, 391.

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## PATENT.

See CROWN LANDS—PATENTS FOR INVENTIONS.

## PATENTS FOR INVENTIONS.

*Sale of invention to be patented—Materiality of name—Agreement.*]

A declaration set out an agreement, which after reciting that the plaintiff had made an invention called "The New Dominion Stove-pipe Collar," and the agreement of the parties for the sale and purchase thereof, it was witnessed that plaintiff agreed to sell and defendant to purchase the right to use and sell, &c., the said article known as the above, in consideration of a specified sum to be paid after the issue of the patent therefor. The declaration then averred that the patent had issued for the invention referred to in the agreement and covering the article there described, though it was described in the patent as "Wandby's Improved Stove-pipe Collar," and that all conditions had been fulfilled, &c., yet the defendant had not paid, &c.

Plea: that when the agreement was made both parties contemplated that the invention should be called "The New Dominion Stove-pipe Collar" and should be so described in the letters patent, with the object, amongst others, of distinguishing it from another similar but less valuable invention theretofore manufactured and sold by the plaintiff under the name of "Wandby's Improved Stove-pipe Stone"; and that the change of name was made by the plaintiff without defendant's knowledge or consent.

Held, plea good, for that the name of the invention was a material part of the contract.—*Wandby v. Hewitt*, 571.

## PAYMENT.

*Of stock in company—Registration of certificate.*]

*Of insurance premium by note—Authority of agent to receive.*]

—See INSURANCE, 6.

## PERSONAL SECURITIES.

*Right of executors to pledge.*]

—See EXECUTORS.

## PETITION.

*Election—Counsel fees—Action for.*]

—See PARLIAMENT.

## PIANO.

*Agreement for sale and hire of—Property passing—Evidence—Replevin.*]

—See SALE OF GOODS, 1.

## PLAINTIFF.

*Right to substitute.*]

—See INSOLVENCY, 5.

## PLANS.

*Claim by architect for preparing, when loss sustained by his negligence.*]

—See WORK AND LABOUR.

## PLEADING.

1. *Declaration—Demurrer—Insolvent Act, 1875, secs. 36.*]

A declaration, after declaring on two bills of exchange in separate counts, proceeded to aver that the debt for which the bills were given, was contracted under such circumstances as to render the defendant liable to imprisonment under the 136th section of the In-

solvent Act of 1875. To this amount defendant demurred, treating it as a third count, on the ground that it was defective in not alleging certain facts necessary to bring defendants within the provisions of the Act.

*Held*, that this averment was not the subject of either a plea or demurrer.—*Rutherford v. Eakins*, 55.

2. *Equitable defences.*] — Per Gwynne, J.—The statute authorizing equitable defences does not authorize pleading matters which are merely evidence under a legal plea.—*Mackenzie v. Davidson*, 188.

*Materiality of name of invention.*] — See PATENTS OF INVENTIONS.

*Right of brother to maintain action of seduction.*] — See SEDUCTION.

*Trespass to try boundary—Not guilty—Effect of.*] — See SURVEY, 3.

See CONTRACT, 1—CROWN LANDS, 1—DEBENTURES—FOREIGN JUDGMENT—INSOLVENCY, 2, 4, 7—INSURANCE, 2.

## PLEDGE.

*Right of executors to pledge personal securities.*] — See EXECUTORS.

## POLICY OF INSURANCE.

See INSURANCE.

## POSSESSION.

*Of goods—Change of.*] — See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

*Of land—Title by.*] — See LIMITATIONS, STATUTE OF—WATER AND WATER COURSES.

## PREFERENCE.

*Under Insolvent Act.*] — See INSOLVENCY, 4.

## PREMIUM.

*Insurance—Payment by note—Authority of agent.*] — See INSURANCE, 6.

## PREMIUM NOTE.

*Non-payment of assessments—Waiver—Pleading.*] — See INSURANCE, 4, 7.

## PRINCIPAL AND AGENT.

See AGENT.

## PRINCIPAL AND SURETY.

See SURETIES.

## PRIVATE PERSONS.

*Right to take warehouse receipts.*] — See WAREHOUSE RECEIPTS.

## PROOFS OF LOSS.

See INSURANCE, 2, 3.

## PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—BILLS OF SALE AND CHATTEL MORTGAGES, 1.

## PROPERTY PASSING.

*Agreement for sale and hire of piano—Evidence—Replevin.*]—See SALE OF GOODS, 1.

*Agreement to cut timber—Destruction by fire—Appropriation—Delay in accepting.*]—See SALE OF GOODS, 2.

## PROVISIONAL CORPORATION.

*Treasurer of—Subsequent appointment to new county—Liability of sureties.*]—See MUNICIPAL CORPORATIONS, 1.

## PUBLIC SCHOOLS.

*Alteration of school sections—By-law authorizing—Appeal to county council—Debentures—Requirements of—*37 Vic. ch. 28, secs. 48, 61.]—A township council in April, 1874, under 37 Vic. ch. 28, sec. 48, passed a by-law altering certain school sections in the township, and on its being petitioned against to the county council, they, in June, 1874, appointed a committee, under sec. 61, to settle the matter. In November, 1874, the committee established the sections, and reported to the county council, which, under sec. 57, would not take effect until the 25th of December following; but in consequence of the report embracing union sections over which the committee had no control it was inoperative. In June, 1875, the township council passed another by-law, repealing their former by-law, and defining the limits of the sections. This also on petition was referred by the county council to a committee to

settle and report on, which they did in December. Previously, however, to their report being so made, the township council, on the 11th September, 1875, passed the by-law in question, levying a rate for school purposes on the sections as they existed prior to December, 1874.

*Held*, that the by-law was valid, for that until the result of the appeal was reported to the county council the sections as established before December, 1874, continued to exist.

By-laws were passed by a township council granting to the trustees of school sections authority to issue debentures for the erection of a school house, and creating a rate not payable within the year, but without settling an equal special rate in each year, &c., as required by sec. 243 of the Municipal Act of 1873. *Held*, invalid.

The by-laws authorized the trustees of the school section, instead of the reeve of the township, to sign the debentures: *Held*, also a fatal objection, notwithstanding that in fact the debentures had been executed by the reeve.—*Re McIntyre and Corporation of Elderslie*, 58.

## QUARTER SESSIONS.

*Road laid out by—Right to original allowance.*]—See WAYS, 3.

## QUANTUM MERUIT.

See CONTRACT, 2.

## RAILWAYS.

1. *Carriage of goods—Through contract—Agreement—Conditions—Evi-*

dence.]—In 1874, the plaintiff, at Toronto, agreed with defendants, to forward all his goods for the season of 1874 via the defendants' railway and Lake Superior line of steamers to Duluth and thence to Fort Garry, the defendants to forward the goods from Toronto to Duluth at 75 cents per 100 lbs., and the rate from Duluth to Fort Garry to be \$2.90 per 100 lbs., subject to changes of tariff of the Northern Pacific Railway, and Kitson's line of Red River steamers. The goods in question were shipped by plaintiff under a shipping note, addressed to himself at Fort Garry, "George G. Allen, C. O. D.," subject to the following amongst other conditions: That when goods are addressed to consignees beyond the places of the company's stations, they will be forwarded by public carriers or otherwise, as opportunity offered, &c.; but that the delivery by the company will be complete, and their responsibility cease when such carriers have received notice that the company is prepared to deliver to them the goods for further conveyance; and they will not be responsible for any damage or detention, &c., after such notice, or beyond their limits. The goods were carried by defendants to Collingwood, and thence by the Lake Superior steamers to Duluth, where they were delivered to the Northern Pacific R. W. Co., and carried by them and Kitson's steamers to Fort Garry, and there delivered to Allen, but without payment of the price. The plaintiff then made a claim against defendants for such delivery without payment, and so opened his case at the trial, but on its appearing that payment was to be made to the express company, and on the plaintiff stating that his claim was for the delivery without his order or endorsement of

the shipping note, his claim was rested on this ground.

*Held*, that plaintiff could not recover, for that defendants' contract was only to carry to Duluth, and on the delivery there to the Northern Pacific R. W. Co., their liability was at an end.

*Semble*, that even if defendants' contract extended to Fort Garry, there would be no liability, for the evidence shewed that it was never intended that the goods should not be given up except on a formal order by the plaintiff or endorsement of the shipping bill.—*Rennie v. Northern R. W. Co.*, 153.

2. *Bonuses—Conditions*—33 Vic. ch. 36, O., 34 Vic. ch. 41, O.—*Construction of*.]—By 33 Vic. ch. 36, sec. 7, O., municipalities were authorized to aid the Hamilton and Erie R. W. Co., subsequently incorporated with defendants, by way of bonus, subject to such restrictions and conditions as might be mutually agreed upon between the municipality and the directors of the railway; and by 34 Vic. ch. 41, O., amending this Act, the county were authorized on the petition of certain townships and villages of the county, to grant such aid, and issue the debentures of the county payable by special rates and assessments in such townships, &c.

*Held*, that the powers given by the first Act to agree as to the conditions on which such aid should be granted, would apply to aid granted under the subsequent Act.

The conditions agreed upon in this case were, that the defendants should grant and continue to the Great Western R. W. Co., the Grand Trunk R. W. Co., and the Canada Southern R. W. Co., equal privileges

as to working and using the defendants' railway : that defendants should have a siding and flag station at or near to two named villages on their line, and should cause or procure the Grand Trunk R. W. Co. to erect a station at or near a named point of intersection.

*Held*, that these conditions were all legal and valid ; and that defendants, having received the debentures for the bonus, could not object that such agreement was *ultra vires*.—*Corporation of Haldimand v. Hamilton, &c., R. W. Co.*, 228.

See EVIDENCE.

## RATE.

*Not payable within year, and no special rate—Debentures—Validity of.*—See PUBLIC SCHOOLS.

## RECEIPTS.

*Warehouse.*—See WAREHOUSE RECEIPTS.

## REFERENCE.

See ARBITRATION.

## REGISTRY.

*Of certificate of payment of individual stock.*—See CORPORATIONS.

*Ship.*—See SHIPPING, 1.

## RENEWAL.

*Timber license, after issue of patent.*—See CROWN LANDS.

## RENT.

See DISTRESS.

## REPAIR.

*Of sidewalk—Accident—Contributory negligence.*—See WAYS, 2.

See WAYS, 1.

## REPLEVIN.

*By mortgagee of chattels when mortgage not due.*—See INSOLVENCY, 4.

*Agreement for hire and sale of piano—Property passing—Evidence.*—See SALE OF GOODS, 1.

## REQUEST NOTE.

See EVIDENCE.

## RESCISSION.

*Of letters patent.*—See CROWN LANDS.

## RIVER.

*Land bounded by—Top of the bank.*—See WATER, AND WATER COURSES.

## ROAD.

See WAYS, 3.

## ROAD ALLOWANCE.

*Original—Right to, when road laid out by Quarter Sessions.*—See WAYS, 3.

## SALE.

*Of insolvent estate en bloc—What passes under—Right to dispute securities.*—See **INSOLVENCY**, 5.

*Of invention to be patented—Materiality of name.*—See **PATENTS FOR INVENTIONS**.

## SALE OF GOODS.

1. *Piano—Agreement for hire and sale of—Property passing—Evidence—Replevin.*—By an agreement signed by defendant he acknowledged the receipt from the plaintiffs on hire at \$6 per month of a piano, valued at \$300, which he was to pay the plaintiffs if it were destroyed or not returned to them on demand, in good order, &c. It was agreed that defendant might purchase it for this sum by two payments of \$150 each on the 1st of July and November respectively, but until payment of the whole purchase money it was to remain plaintiff's property on hire by defendant, and on default in the punctual payment of any instalment of such purchase money, or of the monthly rental, the plaintiffs might resume possession, although there might have been a part payment of the purchase money or a note or notes given therefor, the agreement for sale being conditional and punctual payment being essential to it; but if so assumed by plaintiffs and returned in good order, any sum received on account of purchase money beyond the amount due for rent and expenses incurred was to be repaid. The defendant gave two notes for \$150 each payable at the dates mentioned in the agreement, and shortly after the maturity of the first note paid \$50 on account of it; and subsequently, on being pressed

by the plaintiffs, he gave them a mortgage on some lands, which the plaintiffs received as collateral security for the amount then due, reserving their rights under the agreement. The piano remained with defendant for over two years, nothing being paid on the mortgage or any further sum on account of the notes or for rent. The defendant swore that he had bought the piano before he signed the agreement.

*Held*, that under the agreement the property in the piano remained in the plaintiffs until the payment of the amount fixed as the purchase money, and that there was nothing in the evidence, more fully set out below, to shew any contrary intention; and that default having been made the plaintiffs might maintain replevin.—*Mason et al. v. Johnson*, 208.

2. *Agreement to cut lumber—Property passing—Destruction by fire—Appropriation—Delay in accepting.*—By an agreement, dated 17th December, 1876, plaintiff agreed to procure and have sawed for defendant at the Waverley Mill, 18,000 feet of lumber at \$10 per thousand, to be delivered as early in May as possible; defendant agreeing to pay therefor in the manner specified on delivery of the lumber. The lumber was not all cut until the fifth June, and defendant was not aware of its being so cut until after it had been destroyed by fire, which occurred on 12th June, but evidence was given by plaintiff, which defendant denied, that on the 20th May, defendant promised to go up in two weeks and accept the lumber; and it appeared that of the lumber so cut, 9,000 feet was placed in a pile by itself for defendant, but the residue was not

separated from other lumber which the plaintiff was getting sawed at the same time.

*Held*, that under the contract no property passed, there having been no delivery or acceptance; and that defendant could not be held liable on the ground of delay in accepting.—*Pew v. Lawrence*, 402.

*Validity of—Trover—Estoppel in pais—Equitable plea.*—See INSOLVENCY, 3.

*En bloc by assignee—Rights of purchaser.*—See INSOLVENCY, 4.

See SHIPPING.

## SALE OF LAND.

*For taxes.*—See ASSESSMENT AND TAXES.

## SALE OF LIQUORS.

See TAVERNS AND SHOPS—TEMPERANCE ACT, 1864.

## SCARBOROUGH, TOWNSHIP OF.

See SURVEY, 1.

## SCHOOLS.

See PUBLIC SCHOOLS.

## SECURITIES.

*Right of executors to pledge.*—See EXECUTORS.

*Right to dispute.*—See INSOLVENCY, 5.

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## SEDUCTION.

*Action by brother—Pleading—C. S. U. C. ch. 77.*—Declaration for the seduction of one C. T., alleging that at the time of the seduction she was the sister and servant of the plaintiff, whereby, &c.

Plea: that at the time of the child's birth C. T.'s father was dead, and her mother was then and still is alive and a British subject, and at the commencement of the action was and still is a resident of the Province; and that C. T. is her legitimate daughter.

*Held*, declaration good, and plea bad; for the declaration shewed a common law right in the plaintiff to maintain the action; and the plea did not shew enough to divest it under the statute in favour of the mother.—*Tweedlie v. Bogie*, 561.

## SEPARATE ESTATE,

See HUSBAND AND WIFE.

## SERVANT.

See MASTER AND SERVANT.

## SERVICES.

*Claim by architect for—Loss sustained by negligence of—Right of defendant to deduct.*—See WORK AND LABOUR.

See CONTRACT, 2.

## SHAREHOLDER.

See CORPORATIONS.

## SHEEP.

*Killed by dogs—Compensation—Liability of towns—*32 Vic. ch. 31, O.]—See MUNICIPAL CORPORATIONS, 2.

## SHIPPING.

1. *Goods supplied to vessel—Contract by master—Evidence of ownership—Liability.*]—In an action against defendant for goods supplied by plaintiffs to certain vessels, at the request of the masters' thereof, there was no evidence of defendant having employed the masters, and though the vessels appeared to have been transferred to defendant before the goods were supplied, the transfers were not registered until after, nor was any express contract with defendant proved.

*Held*, that defendant was not liable.—*Hawn et al. v. Roche*, 142.

2. *"Dangers of navigation"—Carriers—Exemption—*37 Vic. ch. 25, D.]—Under a contract to that effect, the plaintiff, during the month of January, 1875, loaded defendants' vessel, which was frozen in the ice in Port Hope harbour, with a cargo of peas, to be carried in the vessel on the opening of navigation to Kingston or Oswego. While the goods were so on board, the vessel struck a sunken rock, unknown to all parties, at the bottom of the harbour, which broke a hole in the vessels' bottom, causing her to sink, and damaging the cargo.

*Held*, assuming the defendants' liability to be that of carriers, that this was a loss caused by the "dangers of navigation," within the meaning of 37 Vic. ch. 25, sec. 1, D., so as to exempt the defendants from liability.

*Quere*, whether defendants were responsible as carriers or as warehousemen.—*Cluxton v. Dickson et al.*, 170.

## SHIPPING BILL.

See EVIDENCE—RAILWAYS, 1.

## SIDE LINES.

*Township of Emily.*]—See SURVEY, 2.

## SIDEWALK.

*Defective—Accident—Contributory negligence.*]—See WAYS, 2.

## SIGNATURE.

*Debentures.*]—See PUBLIC SCHOOLS.

*Evidence of, to notice not to supply liquor.*]—See TEMPERANCE ACT, 1864.

## STAMPS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

## STATUTES, CONSTRUCTION OF.

50 Geo. III. ch. 1.]—See WAYS, 3.

4 Geo. IV. ch. 10.]—See WAYS, 3.

12 Vic. ch. 78.]—See MUNICIPAL CORPORATIONS, 1.

13-14 Vic. ch. 24.]—See MUNICIPAL CORPORATIONS, 1.

20 Vic. ch. 69.]—See WAYS, 3.

22 Vic. ch. 20.]—See WAREHOUSE RECEIPTS.

Consol. Stat. C. ch. 54.]—See WAREHOUSE RECEIPTS.

See CORPORATIONS.

Consol. Stat. U. C. ch. 22, sec. 160.]—  
See ARBITRATION.

Consol. Stat. U. C. ch. 45, sec. 5.—See  
BILLS OF SALE AND CHATTEL MORTGAGES,  
1.

Consol. Stat. U. C. ch. 73.]—See HUSBAND AND WIFE.

Consol. Stat. U. C. ch. 77.]—See SE-  
DUCTION.

23 Vic. ch. 24, sec. 1.]—See FOREIGN  
JUDGMENT.

24 Vic. ch. 64.]—See SURVEY, 1.

25 Vic. ch. 38.]—See SURVEY, 1.

31 Vic. ch. 1, secs. 33-5, O.]—See  
FOREIGN JUDGMENT.

31 Vic. ch. 8, O.]—See CROWN LANDS,  
2.

31 Vic. ch. 9, sec. 4, D.]—See BILLS OF  
EXCHANGE AND PROMISSORY NOTES, 2.

32 Vic. ch. 31, O.]—See MUNICIPAL  
CORPORATIONS, 2.

32-33 Vic. ch. 29, sec. 32 D.]—See  
TAVERNS AND SHOPS.

32-33 Vic. ch. 31, sec. 5, D.]—See  
TAVERNS AND SHOPS.

33 Vic. ch. 36 O.]—See RAILWAYS, 2.

34 Vic. ch. 41, O.]—See RAILWAYS, 2.

35 Vic. ch. 12, O.]—See FOREIGN JUDG-  
MENT.

35 Vic. ch. 16, O.]—See HUSBAND AND  
WIFE.

36 Vic. ch. 44, sec. 33. O.]—See INSU-  
RANCE, 2.

36 Vic. ch. 60, O.]—See SURVEY, 2.

37 Vic. ch. 25, D.]—See SHIPPING, 2.

37 Vic. ch. 32, O.]—See TAVERNS AND  
SHOPS.

37 Vic. ch. 47, secs. 2, 3, 12, D.]—See  
BILLS OF EXCHANGE AND PROMISSORY  
NOTES, 2.

38 Vic. ch. 15, sec. 2, sub-sec. h., secs.  
10, 49-52, 61, 125, 136, D.]—See INSOL-  
VENCY, 1, 4, 6.

38 Vic. ch. 16, O.]—See LIMITATIONS,  
STATUTE OF, 2.

39 Vic. ch. 7, O.]—See FOREIGN JUDG-  
MENT.

39 Vic. ch. 28, sec. 5, O.]—See ARBI-  
TRATION.

## STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

## STOCKHOLDER.

See CORPORATIONS.

## STOPPAGE IN TRANSITU.

*Goods bonded in consignee's name—Duties unpaid.*]—The plaintiffs at Philadelphia sold to E. B. & Co. at Toronto 92 bags of coffee on credit, and consigned the same to them in bond. On arrival at Toronto, they were entered and bonded in the consignees' names and placed in one of the custom's bonded warehouses, subject to the payment of duties. Subsequently E. B. & Co. paid the duties and took out of bond 54 of the bags, but 38 bags still remained in bond, subject to duty, and while they so remained E. B. & Co. became insolvent.

*Held*, that the right of stoppage in transitu still existed in the plaintiffs, though the goods were bonded in the names of the consignees, for until the duties were paid the goods could not be deemed either actually or constructively to have come into the possession of the consignees so as to put an end to the transitus. *Graham et al. v. Smith*, 1. (a)

## STREET.

See WAYS.

## SUBMISSION.

See ARBITRATION.

## SURETIES.

*Liability for treasurer of provisional corporation on appointment to new county.*]—See MUNICIPAL CORPORATIONS, 1.

(a) This case has since been overruled in Appeal by *Wiley v. Smith*, 3 App. R. 179, which last named decision has been affirmed by the Supreme Court.

## SURVEY.

1. *Township of Scarborough*—24 Vic. ch. 64, 25 Vic. ch. 38—*Effect of survey—Proof of original monuments—Statute of Limitations.*—In ejectment to try a question of boundary, the plaintiff claimed the north half of lot 31. Defendants limited their defence to a piece described by metes and bounds, giving notice that they claimed it as part of lot 32. *Held*, that the plaintiff was not entitled to succeed on proving his title to lot 31; but that it was for him, seeking to change the possession, to shew that the piece in dispute was part of that lot.

In this case it appeared that over twenty years ago a fence was mutually erected by plaintiff and defendants' father, who then occupied lot 32, as a line fence along the course of an old blazed line, though for what purpose such line had been run did not appear. The fence continued to be used as a line fence until 1862-3, when, in consequence of the survey made under the 24 Vic. ch. 64, and 25 Vic. ch. 38, the plaintiff claimed that the line was incorrect, and he procured the surveyor, who had made the survey, to run the line. The surveyor divided equally the space in the block containing these two lots between the road monuments planted several years previously by himself at the front angles of the side road allowances; but there was no evidence to shew how he ascertained the position of such side roads in making that survey, or for any search for the original monument. In 1865-6, after this new line had been run, the plaintiff pulled down a piece of the old fence and removed it to the new line, where it remained for two or three days, until put back by the defendants to the original line, where it has so remained ever since.

*Held*, that these statutes did not interfere with any original posts, if existing: that the evidence was insufficient to shew plaintiff's right to claim according to the statutable survey, and a new trial was granted.

Per GWYNNE, J.—That the onus was on the plaintiff of proving the original monument marking the front angle of the lot, or its loss, and that there was no satisfactory evidence of its position, before the mode adopted of dividing the space between the road monuments could be adopted.

Per HAGARTY, C. J.—That on proof, which was wanting here, of the statutable directions having been obeyed in laying out such side lines and planting the monuments, then that plaintiff would be entitled to the statutory division, and the onus of proving an original monument, marking the front angle of the lot, was on the defendants.

Per GALT, J.—That under those statutes, the onus of proving the existence of original monuments was cast upon the person asserting it.

*Semble*, that the plaintiff's entry in 1865-6 was sufficient to stop the running of the Statute of Limitations.—*Palmer v. Thornbeck et al.*, 291.

2. *Township of Emily—Side lines*—36 Vic. ch. 60, O.]—By 36 Vic. ch. 60, sec. 1, O.,—after reciting that great inconvenience had resulted from the concessions in the township of Emily having been intended to be made double-fronted, but posts not having been in many cases planted at the front and rear angles of the lots—it is enacted that notwithstanding anything in secs. 28-31, inclusive, of C. S. U. C. ch. 93: 1. Where posts were in the original survey planted at the front, but not at the rear angles of any lot, the side lines should be run from the posts at the

front angles to the rear of the concession, parallel with the governing line. 2. Where posts were in the original survey planted at the rear angles of any lot, the side lines should be run from the front angles of such lot parallel with the governing line to the centre of the concession, and thence direct to the post at the rear angle. 3. In all other cases, the side lines should be run from the front angles of the lots to the rear of the concession, parallel to the governing line.

In trespass, to try the boundary between lots 15 and 16 in the 14th concession, it was admitted that the original survey of the township was intended to be in double-fronted concessions, and that there was satisfactory evidence of the original posts at the north or rear end of the concession, between lots 14 and 15 and lots 17 and 18, but not of the intermediate posts. It was admitted also that a post had been planted in the rear, in the original survey between the two lots in question; and the post in front was agreed upon.

*Held*, that the case came within the third sub-section, and that the line must therefore be drawn from the front to the rear of the concession parallel with the governing line. —*Dyell v. Millage*, 347.

3. *Boundary—Double-front concession—Evidence of.*—In trespass *quare clausum fregit*, to try the boundary line between lots 28 and 29 in the 5th concession of Ops, the plaintiff described in his declaration by metes and bounds the piece of land trespassed upon, alleging it to be part of 28, to which lot his title was not disputed:—*Held*, that “not guilty” was the only plea required, and that the other pleas pleaded and

set out in this case were unnecessary and inappropriate.

The land in question was situated at the rear of the concession (the concessions running north and south and numbering from the west), and plaintiff, claiming that it was a double-front concession, had the division line run from a point on the concession line in the rear, or, what he claimed to be the east front, of the concession; but there was no proper evidence of the concession having, in the original survey, been laid out as a double-front concession, and of posts being planted in the rear, while the lots were granted by the letters patent as whole, and not as half, lots.

*Held*, the fact of 28 and 29 having been granted as whole lots, was *prima facie* evidence of the concessions being single-fronted, and that the grant of half lots in the adjoining concession could not affect it.

*Held* also, that the fact of defendants attempting to prove a post in rear, from which they contended the line should be run, did not estop them from asserting that the concession was single-fronted.

The jury were asked to find:—1. Is the point contended for by the defendants the place where the original post stood? 2. Did the plaintiff, when he moved his fence, do so on the understanding with defendants that they acknowledged his right, or, was his possession to be subject to the correct adjustment of the line? They found that the post had not been proved, and that the plaintiff was given possession by the defendants:—*Held*, that on the first answer the verdict should have been for defendants, for the fact that defendants had not proved the post did not relieve plaintiff from proving

the true line ; and that the second question was not presented by the case.— *Dark v. Hepburn et al.*, 357.

## TAVERNS AND SHOPS.

*Sale of liquor—Conviction for, under 37 Vic. ch. 32, O.—Objections to information and conviction—32-33 Vic. ch. 29, sec. 32, D., ch. 31, sec. 5, D.*—An information stated that defendant, “a licensed hotel-keeper in the town of Peterborough, did, on Sunday the 2nd July, 1876, at the hotel occupied by him in the said town dispose of intoxicating liquor to a person who had not a certificate therefor, &c.: and the conviction thereunder stated that the defendant was convicted “upon the information and complaint of J. R. the above named complainant, and another, before the undersigned,” &c., “for that the said defendant,” &c., in the words of the information.

*Held*, that the person to whom the liquor was sold, should have been named or described ; but that such an objection, under 32-33 Vic. ch. 29, sec. 32, D., which applies to informations, was only tenable on motion to quash the information when before the magistrate.

*Quere*, whether, 32-33 Vic. ch. 31, sec. 5, D., which enacts that no objection to any information for any defect in substance or form therein, should be allowed, would not be a sufficient answer to the objection.

*Held* also, that it sufficiently appeared that the hotel was a licensed hotel at which liquor was allowed to be sold : that a sale “at” the hotel was equivalent to a sale “therein, or on the premises thereof,” and that it sufficiently appeared that the defendant was “the proprietor in occu-

pancy or tenant or agent in occupancy.”

*Held* also, that the words “and another” could be treated as surplusage, it appearing in fact that J. R. was the only complainant.—*Regina v. Cavanagh*, 537.

*Notice to tavern keeper not to supply liquor—Proof of damages.*—See TEMPERANCE ACT, 1864.

## TAXES.

See ASSESSMENT AND TAXES.

## TEMPERANCE ACT, 1864.

*Notice not to supply liquor—Proof of damages—Recalling witness.*—In an action under sec. 42 of the Temperance Act of 1864, 27 Vic. ch. 18, by a wife against a tavern keeper for supplying her husband with liquor after service of a “notice in writing signed by her” in accordance with the statute, there was no evidence to shew that she in fact signed the notice served, but merely that she signed a notice a copy of which was served. *Held*, insufficient.

*Held* also, that under the statute no proof of actual damage is necessary to the maintenance of the action.

At the trial the learned Judge having declined to allow a witness twice called in the progress of the suit to be recalled, or to wait for the possible arrival of another witness, the Court refused to review the exercise of his discretion in so doing.—*Gleason v. Williams*, 93.

## TENANT.

See LANDLORD AND TENANT.

## TIMBER LICENSE.

*See* CROWN LANDS.

## TITLE.

*By possession.*—*See* LIMITATIONS, STATUTE OF.

*See* DEED.

## TOP OF THE BANK.

*See* WATER AND WATER COURSES.

## TENANCY AT WILL.

*Subsequent determination of and creation of fresh tenancy—Mortgage*—38 *Vic. ch. 16, O.*—*See* LIMITATIONS, STATUTE OF, 2.

## TOWNS.

*Liability of, for sheep killed by dogs.*—*See* MUNICIPAL CORPORATIONS, 2.

## TOWNSHIP.

*School sections—Alteration of.*—*See* PUBLIC SCHOOLS.

*See* SURVEY, 1, 2.

## TREASURER.

*Municipal—Books of—Evidence of taxes due.*—*See* ASSESSMENT AND TAXES.

*Of provisional corporation—Subsequent appointment to new county—Liability of sureties.*—*See* MUNICIPAL CORPORATIONS, 1.

## TRESPASS.

*Boundary—Not guilty—Effect of.*—*See* SURVEY, 3.

## TRIAL.

*Refusal of Judge to recal witness.*—*See* TEMPERANCE ACT 1864.

## TROVER.

*Vessel—Conversion—Statute of Limitations*—About 1857, the plaintiff purchased from the owner of a certain steamer the copper sheeting, &c., thereon, it being understood that he was to get it when a suitable time arrived, as by dry-docking or hauling out the vessel. The yacht club soon after bought the hull, which they used as a club ship, having the same understanding with the plaintiff. Shortly afterwards the plaintiff with the consent of the club took off the sheeting to the waterline, when the club, thinking that the vessel was being injured, but without disputing the plaintiff's ownership, refused to allow him to take off any more, and the plaintiff desisted. In 1869 the club sold the vessel to one C., who gave a chattel mortgage for the unpaid purchase money, and on making default, judgment was recovered against him, and, under a *fi. fa.* goods thereon, C.'s interest was sold to defendant, the plaintiff being at the sale and informing defendant of his claim. It was proved that the vessel had become a total wreck, and useless as a ship. The defendant having refused to give up the copper after demand made, the plaintiff in December, 1875, brought trover therefor, when defendant insisted that plaintiff's right was barred

under the Statute of Limitations, for that there was a conversion by the club's refusal to allow the copper to be taken off, or at all events by the sale to C.; and that six years had elapsed in either case before action brought.

*Held*, that the plaintiff was entitled to the copper, and to maintain trover for it, and that neither of the acts relied on by defendant amounted to a conversion or could be so set up by him.—*Keith v. McMurray*, 428.

See INSOLVENCY, 3.

## TRUSTEES.

*When necessary parties.*—See HUSBAND AND WIFE.

*School.*—See Public Schools.

## ULTRA VIRES.

*Conditions under which bonuses granted—Validity of.*—See RAILWAYS, 2.

## USURY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

## VACANCY.

*Condition as to insured property—Notice of—Authority of agent—Evidence.*—See INSURANCE, 1.

## VENDOR'S LIEN.

*Province of Quebec.*—See INSURANCE, 4.

## VESSEL.

*Goods supplied to—Contract by master—Evidence of ownership—Liability.*—See SHIPPING, 1.

*Conversion—Statute of Limitations.*—See TROVER.

## WAIVER.

*Non-payment of assessments—Pleading.*—See INSURANCE, 4, 7.

## WAREHOUSEMEN.

See SHIPPING, 2.

## WAREHOUSE RECEIPTS.

*Rights of private persons to take them—What constitutes a debt—Specific appropriation of goods—Conversion—22 Vic. ch. 20; C. S. C. ch. 54.*—On the 29th June, 1872, C. of the firm of J. F. C. & Co., who had stored a quantity of coal with defendants, for which defendants were to give warehouse receipts on certain terms, applied to the plaintiff for his acceptance for the firm's accommodation of two bills of exchange, one for \$1,500, and the other for \$900, offering to give him defendants' warehouse receipt for 400 tons of coal as security therefor. The plaintiff agreed to accept on these terms, of which C. notified the defendants, obtained their receipt, dated 27th June, 1872, and endorsed it over to the plaintiff, who then accepted the bills on the faith of this receipt. At the maturity of the bills the plaintiff retired them, by a renewal of and paying at maturity the \$1500 one, and by giving H., one of the

defendants, into whose hands the one for \$900 had come, his notes therefor, which were not paid. On the 28th November, a writ of attachment issued against J. F. & Co. On the 30th, they made an assignment in insolvency, and on the same day the official assignee took possession of the coal. On the 14th December, the plaintiff went to defendants and asked for the coal, but defendants stated that they could not give it to him as the assignee had taken possession of it; and he subsequently called at different times, but received in effect the same reply. The coal which was proved to have been worth between \$5 and \$6 per ton, was afterwards sold by the assignee at an average of \$3.80 per ton. The plaintiff, on the 28th February, 1876, brought an action of trover against defendants for their refusal to deliver.

*Held*, that under 22 Vic. ch. 20, as consolidated in Consol. Stat. C. ch. 54, private persons, and not banks alone, are entitled to take warehouse receipts, and that such right has not been interfered with by subsequent legislation.

*Held* also, following *Re Coleman*, 36 U. C. R. 559, the plaintiff's acceptance constituted a debt due by Coleman & Co. to the plaintiff, when the receipt was endorsed within the meaning of the Statute.

*Held*, also, that there was a sufficient demand and refusal to enable the plaintiff to maintain the action, and that it was so made during the currency of the receipt.

*Held*, also, that there was no necessity for any specific appropriation of coal to answer the receipt; and that at all events defendants could not set up this objection.—*Cockburn v. Sylvester et al.*, 34.

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## WARRANT.

*On sale for taxes—Proof of.]—*  
See ASSESSMENT AND TAXES, 1.

## WATER AND WATER-COURSES.

*Deed—Top of the bank—Possession—Evidence.]—*A deed of certain land described it as the east portion of lots 1 and 2 on the north side of the Grand River, and one of the metes and bounds was "to where a post has been planted at the top of the bank of the Grand River (but no post appeared to have been planted); thence along the top of the bank of the Grand River," &c. By a clause in the deed the grantor was allowed the use of whatever water he might require from the Grand River opposite the said land for any works then or to be erected on the said land, so as in such use nothing was done to impede or injure the owners or occupiers of certain mill property in the full enjoyment of the water power appertaining thereto," &c. And in an agreement previously entered into, and in pursuance of which the deed was executed, there was a clause to the same effect. It appeared that the top of the bank was not now discernable, having been cut away by the defendant. There was contradictory evidence as to twenty years' possession by defendant, and the learned Judge at the trial found there was none.

*Held*, on appeal—reversing the judgment of the Common Pleas, DRAPER, C. J. OF APPEAL, and GALT, J., dissenting.—1. That the deed only conveyed the land to the top of the bank, and not *ad medium filum aquæ*,

the clause in the deed and agreement supporting such a construction. 2. That the finding of the learned Judge on the question of possession should not be interfered with.—*Robertson v. Watson*, 579.

### WAYS.

1. *Municipal corporations—Defect in highway by third person—Liability.*—In an action against defendants for an accident to the plaintiff by falling into a drain, which had been opened or dug in a street at one of the most frequented places in the city, and which had remained in an unprotected state for a considerable time, the men having been engaged in working at it nearly a month.

*Held*, that it was no defence that defendants did not make or authorize the drain to be dug, as under the circumstances they must be deemed to have had the fullest notice.—*Adair v. Corporation of Kingston*, 126.

2. *Municipal Corporations—Defective sidewalk—Want of repair—Accident—Contributory negligence—New trial refused.*—On the second trial of this case (see 25 C. P. 420), the jury in answer to questions submitted to them found in substance, that though defendants had generally performed their duty as to the repair of the sidewalks, yet in this case the sidewalk was not in a reasonably sufficient state of repair; and that, though plaintiff by watching her steps, &c., might have avoided the hole, yet that she exercised that due care and caution that a person would ordinarily use, under the circumstances.

*Held*, that on this finding the plaintiff was entitled to recover.—*Boyle et ux. v. Corporation of Dundas*, 129.

3. *Highways—Road laid out by Quarter Sessions—Right to original allowance*—50 Geo. III. ch. 1, 4 Geo. IV. ch. 10—*Municipal Acts—Construction of.*—The plaintiff claimed in right of his wife, under a deed to her, dated 7th October, 1867, of the south half of lot nine, in the fifth concession of Haldimand, to be entitled to the original allowance for road between lots eight and nine, by reason of the Justices of the Quarter Sessions having in 1837 laid out a road across this south half in lieu, as was claimed, of the original allowance. In proof thereof, the report of the then surveyor was produced, dated 15th July, 1837, addressed to the Justices reciting the petition of twelve freeholders for the new road, with his certificate of his having examined and surveyed it and given notice according to law; the road to be 50 feet wide. He also certified as to his having examined the original allowance and found it impracticable by reason of bad hills and swamps, while the new road was good. On the back of the report was endorsed the minute of the Quarter Session thereupon, namely, "Read and opposed and confirmed, this 18th July, 1837," &c., which, with the user, &c., of the road as a highway, was the only evidence of their action in the matter. The road was proved to be 40 feet wide, while the allowance was 60 feet. In April, 1865, the owner of lot No. 9, amongst others, petitioned for the passing of a by-law to open this allowance; and evidence was offered and rejected that the then owner of lot nine was also owner when the new road was opened. In March, 1866, a by-law was passed opening up this allowance; and the owner of lot nine, then moved his fence to the limit of the allowance. In November, 1875, another by-law

was passed repealing the previous by-law, but without expressing it to be for the purpose of closing up this road allowance.

*Held*, that the plaintiff acquired no right to the original allowance under 50 Geo. III. ch. 1, and 4 Geo. IV. ch. 10, under which the new road, if legally laid out at all, was laid out, and under which he must be assumed to have received compensation, or to have released or discharged his claim therefor; nor under the 20th Vic. ch. 69, or the subsequent Municipal Acts identical therewith; or at all events they did not apply to a road opened up by the Quarter Sessions, not in lieu of the original allowance, but as a new road, which its course and its not being of the same width as the old road was evidence of, or to such road, not opened up by the owner himself, but by authority against his will, or by his consent, without any claim for compensation.

*Quære*, whether the owner at the time the new road was opened, was not the only person, if any there was, entitled to a conveyance, and whether his right would pass by a mere conveyance of the lot.

*Held*, also, that it was a condition precedent to the granting of such conveyance that the old road should be useless, whereas the passing a by-law to open it up was evidence to the contrary.

*Held*, also, that the evidence that the owner of lot nine had in 1865, petitioned for the opening up of the old road allowance, was admissible.

*Held*, also, that the by-law passed in November, 1875, repealing the previous by-law did not operate as a by-law for closing up the allowance.

*Held*, also, that, even if entitled to a conveyance, the plaintiff could not claim without one under the statute.

The various statutes upon the subject reviewed.—*Cameron et ux. v. Wait*, 475.

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## WIFE.

*See* HUSBAND AND WIFE.

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## WITNESS.

*Refusal of Judge to recall.*—*See* TEMPERANCE ACT, 1864.

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## WORDS MEANING OF.

*"Coupon."*—*See* DEBENTURES.

*"Occupant."*—*See* INSURANCE, 5.

*"Owner."*—*See* INSURANCE, 5.

*"Dangers of navigation."*—*See* SHIPPING, 2.

*"Top of the bank."*—*See* WATER AND WATERCOURSES.

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## WORK AND LABOR.

*Architect—Claim for services—Loss sustained by plaintiff's negligence—Right of defendant to deduct.*—In an action by the plaintiff, an architect, on the common counts for services in preparing plans and superintending the erection of a house for defendant.

*Held*, that defendant was entitled to deduct from the amount which the plaintiff could otherwise claim any loss which defendant had sustained through the plaintiff's negli-

gence, in certifying for too much for contractors who afterwards failed, in consequence of which defendant was compelled to have the work done by others at a much higher price.—

*Irving v. Morrison*, 242.

## WRITING.

*Parol evidence to explain.*]—See  
EVIDENCE.

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